

REPORTER'S RECORD - AMENDED

VOLUME 2 OF 3 VOLUMES

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COURT OF CRIMINAL APPEALS  
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DEANA WILLIAMSON, CLERK

CAUSE NO. 0632435D

THE STATE OF TEXAS ) IN THE 371ST JUDICIAL  
VS. ) DISTRICT COURT OF  
JOHNNIE E. DUNNING ) TARRANT COUNTY, TEXAS

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CHAPTER 64 DNA HEARING

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On the 28th day of February, 2017, the following proceedings came on to be heard in the above-titled and numbered cause before the Honorable Charles P. Reynolds, Post-Conviction Magistrate, Judge Presiding, held in Fort Worth, Texas, Auxiliary Courtroom B, reported by machine shorthand utilizing computer-aided transcription.

Jana Kay Bravo, CSR  
Deputy Official Court Reporter  
371st Judicial District Court  
Tarrant County, Texas

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1 P R O C E E D I N G S

2 February 28, 2017

3 Tuesday

9:01 a.m.

4 (Open court, Defendant present, no  
5 jury)

6 THE COURT: On the record. We're here  
7 this morning on Cause No. 0632435, State of Texas  
8 versus Johnnie Dunning. This is a proceeding under  
9 Chapter 64 regarding post-conviction DNA testing.  
10 Both parties have announced that they are ready to  
11 proceed. Today we have Mr. Bill Ray for Mr. Dunning,  
12 and for the State we have Dawn Boswell and Steve  
13 Conder. Are there any preliminary matters that we  
14 need to take up?

15 MR. RAY: The only preliminary matter  
16 that I believe we need to take up is yesterday we had  
17 a non-recorded conversation in chambers between  
18 yourself and prosecutors, attorneys for the State and  
19 myself, concerning the Court's order about the  
20 motion, the jurisdictional motion and order that  
21 would have needed to be in place prior to doing DNA  
22 testing. At the conclusion of that hearing the State  
23 agreed to provide an order. They did that. They  
24 sent me a copy of it. I agreed to it in total, and I  
25 don't know if they've given it to you or not. That's

1 kind where we're at, and I would ask that that be  
2 signed before we start.

3 THE COURT: Okay. I don't have it  
4 yet.

5 MR. CONDER: May I approach the bench?

6 THE COURT: You may.

7 MR. CONDER: This is the order.

8 MR. RAY: If it's the same one you  
9 sent --

10 MR. CONDER: If you want to --

11 MR. RAY: No. I trust you.

12 MR. CONDER: This should be the order  
13 that I sent to the Court earlier yesterday.

14 MR. RAY: And I told him if he wanted  
15 to put a signature block on there, that's fine. If  
16 not, that's fine too. My only concern is I want to  
17 make sure that we're all on the same page that in the  
18 event that Mr. Dunning is granted a favorable  
19 finding, or that he's not, either way, and this case  
20 somehow ends up on appeal or in post-conviction writ  
21 for any purpose, the State of Texas is not going to  
22 take the position that he did not jurisdictionally  
23 file proper pleadings. I want to make sure everybody  
24 is on record saying that's the situation. They're  
25 not going to complain that he didn't file the motion

1 to begin with.

2 MR. CONDER: And it's the State's  
3 position that we believe that this order and the  
4 language in it reaffirms the belief that we all had  
5 in the meeting, that Mr. Dunning's original letter  
6 requesting DNA testing was an indication of this  
7 Court's jurisdiction, and this Court has had proper  
8 jurisdiction throughout the whole process to consider  
9 these requests for post-conviction DNA testing.

10 MR. RAY: That's fine. I agree with  
11 that.

12 THE COURT: Very well, and this order  
13 that was just presented to me looks a lot like the  
14 one that was emailed. I don't see -- did you intend  
15 to have signature lines on this order for yourselves?

16 MR. RAY: That was just my suggestion  
17 to him. He didn't ever respond back to me.

18 THE COURT: Okay.

19 MR. CONDER: I don't believe that was  
20 necessary because both parties were in agreement we  
21 were going to do this in open court.

22 THE COURT: Very well.

23 MR. CONDER: And that we've got a  
24 recorded record that the State is not and will not be  
25 challenging the jurisdictional because of its belief



1       also that this Court has proper jurisdiction.

2               MR. RAY:   I'm fine with that.

3               THE COURT:   Very well.   I am now  
4       signing the order, so it's done.

5               MR. RAY:   Can I proceed?

6               THE COURT:   Huh?

7               MR. RAY:   Can I proceed?

8               THE COURT:   You may.

9               MR. RAY:   I call David Pearson.

10              THE COURT:   Good morning, Mr. Pearson.  
11       Would you raise your right hand.

12              (Witness sworn)

13              THE COURT:   Very well.   You may  
14       proceed.

15              MR. CONDER:   Your Honor, before we --  
16       the State would make an objection that we believe  
17       that the testimony about the original trial in a  
18       sense -- is outside the scope of a 64.04 hearing.

19              MR. RAY:   Can I respond?

20              THE COURT:   You may respond.

21              MR. RAY:   I'm not trying to retry this  
22       case.   I'm not trying to argue this case on  
23       guilt-innocence grounds.   However, some of what  
24       Mr. Pearson is going to say in my opinion bears, on  
25       first of all, whether identity was an issue, and

1 second of all, whether the testing that we have  
2 results for would be material and relevant as to the  
3 guilt of this Defendant, which is an issue that this  
4 Court has to decide. So that's the purpose for  
5 calling him.

6 THE COURT: Very well. The Court will  
7 allow his testimony provided that you keep it to the  
8 scope of this --

9 MR. RAY: And I'm not offering  
10 anything he says as far as the guilt or the innocence  
11 of the Defendant to be considered by the Court in  
12 making any decision that you have to make today.

13 THE COURT: Okay.

14 MR. RAY: If something like that comes  
15 out, I'm not asking that you consider that.

16 THE COURT: Very well.

17 MR. RAY: And also, Judge, I would ask  
18 that Mr. Dunning -- and I explained to him outside  
19 the presence of the Court, that he acknowledge that  
20 Mr. Pearson was in fact his lawyer at his plea, and  
21 that by Mr. Pearson taking the stand Mr. Dunning  
22 needs to waive any attorney-client privilege he would  
23 have with Mr. Pearson. I would ask that Mr. Dunning  
24 would do that now.

25 You're agreeing with that? You got to

1 say yes.

2 THE DEFENDANT: Yes.

3 MR. RAY: He's going to talk about  
4 potentially matters that only you and he discussed in  
5 preparing for your trial in this case. Is that  
6 right?

7 THE DEFENDANT: That's right.

8 MR. RAY: The State's going to be able  
9 to cross-examine him on those matters if they want  
10 to. You're all right with that?

11 THE DEFENDANT: All right.

12 THE COURT: You may proceed.

13 DAVID PEARSON,  
14 having been first duly sworn, testified as follows:

15 DIRECT EXAMINATION

16 BY MR. RAY:

17 Q. State your name.

18 A. David Pearson.

19 Q. What do you do for a living?

20 A. I'm an attorney.

21 Q. How long have you been licensed to practice  
22 law?

23 A. Twenty-five years. Since 1991.

24 Q. Are you board certified?

25 A. Yes, in criminal law and criminal appellate

1 law.

2 Q. How long have you been board certified in  
3 both of those specialties?

4 A. In criminal law since 2000 and criminal  
5 appellate law since 2011.

6 Q. And criminal appellate law is relatively a  
7 new certification, and that was the first time you  
8 could be certified; is that correct?

9 A. That was the first year it was even created  
10 for anybody to be certified in appellate law,  
11 criminal appellate law.

12 Q. All right. You represented John Dunning,  
13 the Defendant in this case; is that correct?

14 A. That's correct.

15 Q. You see him in the courtroom sitting here  
16 next to me, right?

17 A. Yes.

18 Q. And he was charged with the offense of  
19 aggravated sexual assault of a child, a person under  
20 14 years of age; is that correct?

21 A. Correct.

22 Q. Ultimately he, Johnnie Dunning, entered a  
23 plea of guilty and received a sentence of 25 years;  
24 is that correct?

25 A. Yes.

1           Q.    Was there DNA testing done in this case  
2 prior to the entry of a plea?

3           A.    No.

4           Q.    To your knowledge by the State or the  
5 Defense?

6           A.    Right.  Not to my knowledge, no DNA testing  
7 was done.

8           Q.    There was some serology, but there wasn't  
9 any actual DNA testing; is that correct?

10          A.    Correct.

11          Q.    If you would, give us kind of a general --  
12 and like I told the Judge in front of you a minute  
13 ago, I'm not asking to try this case.  I just want to  
14 tell the Judge basically what the allegations were  
15 and kind of what the case was about in about 30 words  
16 or less.

17          A.    Well, the young victim, and I won't use his  
18 name, I don't remember whether he was -- a pseudonym  
19 was in the indictment or not, but he said that in an  
20 apartment complex laundry room allegedly the black  
21 man had had sex with him, but the witness that  
22 claimed that he heard him say that was a registered  
23 sex offender living in the same apartment that had  
24 been convicted of aggravated sexual assault in  
25 another state and had moved to Texas and moved into

1 the same family home and was also convicted in this  
2 county a month before Mr. Dunning for aggravated  
3 sexual assault of two children in the same apartment,  
4 and he was a witness.

5 Q. All right. Let me ask you this. Did you  
6 have a defense that you'd aligned in this case and  
7 gone over with Mr. Dunning about what y'all were  
8 going to try to defend this case with had he gone to  
9 trial?

10 A. Yes, and that was our defense.

11 Q. Was that somebody else had committed the  
12 offense, had an opportunity to be around the victim  
13 and was a registered sex offender?

14 A. Well, and that plus the fact that the  
15 victim, it was in the report, was mentally challenged  
16 and deaf. He would have been in my opinion easy to  
17 manipulate, and you have a convicted sex offender  
18 that would be a master manipulator of children by  
19 definition, and he wasn't used as an outcry, but he  
20 was the original witness number two that said that's  
21 what the child said to me. I got raped. The black  
22 man raped me.

23 Q. Okay. Now, and ultimately this child, a  
24 victim, picked Mr. Dunning out of a photo spread; is  
25 that correct?

1           A.     Correct.

2           Q.     And so it was your defense, then, that you  
3     were trying to present to the Court essentially that  
4     someone else who was a bad person had potentially  
5     kind of steered the investigation away from himself  
6     and was a sex offender in his own right; is that  
7     correct?

8           A.     Well, that, and in my opinion that plus  
9     sloppy police work. In other words --

10                   MR. CONDER: Objection, Your Honor. I  
11     think now we're starting to get more of the facts of  
12     the case.

13                   THE COURT: Sustained.

14           Q.     (By Mr. Ray) Let's do it this way. You  
15     wanted to present that defense, what you just  
16     testified to?

17           A.     Right.

18           Q.     And did the State oppose it?

19           A.     Yes.

20           Q.     And did y'all have a hearing where that  
21     issue as to whether or not you were going to be able  
22     to present that was going to be presented?

23           A.     Yeah. The morning of jury trial they  
24     brought up a motion in limine and so -- it came to  
25     light in the motion in limine, and then we had

1 another hearing right after that.

2 Q. And so did the Judge -- it was James Wilson  
3 was the elected judge, correct?

4 A. Right.

5 Q. And the State essentially objected to your  
6 being able to present what you've just talked about,  
7 correct?

8 A. Right.

9 Q. Maybe not the sloppy police work issue, but  
10 certainly this identification, or excuse me,  
11 certainly the registered sex offender issue. That's  
12 what I'm going to call it.

13 A. Right.

14 Q. And you made a bill; is that correct?

15 A. Yes.

16 Q. And then Mr. Dunning ultimately pled  
17 guilty -- well, let me ask it this way. The Judge  
18 didn't allow that information to be presented or it  
19 wasn't going to be presented to the jury; is that  
20 correct?

21 A. Right. He was not going to allow it.

22 Q. And did the Judge allow Mr. Dunning to  
23 enter a plea of guilty and -- but be able to raise or  
24 present the issue of a registered sex offender on  
25 appeal?



1           A.     Yeah. That was clear on the record. We  
2     did an offer of proof by testimony. We reurged that  
3     we should be able to go into that. It was actually  
4     going to be denied, and as a part of that ruling  
5     because of that ruling, he would plead guilty  
6     reserving the right with permission of the Trial  
7     Court that it was -- it was ruled inadmissible, so he  
8     had the right to appeal that on that issue.

9           Q.     Essentially the State was able to suppress  
10    that testimony?

11          A.     Right.

12          Q.     And did you handle Mr. Dunning's appeal?

13          A.     Yes.

14          Q.     And was the case affirmed on appeal?

15          A.     Yes.

16          Q.     And did you file a Petition for  
17    Discretionary Review?

18          A.     Yes.

19          Q.     And did the Court of Criminal Appeals grant  
20    review?

21          A.     No, they did not.

22          Q.     And is that a final order now?

23          A.     Yes.

24          Q.     It's been a decade since that happened,  
25    correct?

1 A. Yes.

2 Q. And was the conversation or the ruling of  
3 the Court, did that have a bearing on whether  
4 Mr. Dunning decided to plead guilty?

5 A. Yes.

6 Q. If Mr. Dunning had gone to trial with what  
7 was alleged in the indictment and been convicted, he  
8 had two prior convictions that enhanced his  
9 punishment to a 25 year minimum; is that correct?

10 A. Correct.

11 Q. And that was the sentence he got?

12 A. Yes.

13 Q. Was that a plea agreement or was it an open  
14 plea? In other words, 25 years was the deal?

15 A. That was the plea agreement.

16 Q. You've reviewed the police report in this  
17 case; is that correct?

18 A. Yes.

19 Q. And you've reviewed the -- what I'm going  
20 to call the sexual assault exam, correct?

21 A. Yes.

22 Q. The sexual assault exam, essentially the  
23 victim said that he had been anally --

24 MR. CONDER: Objection, Your Honor.  
25 This is again going beyond the scope of whether or

1 not the scientific evidence is favorable or not.

2 MR. RAY: All right. Can I approach  
3 the witness?

4 THE COURT: I'll allow it just so he  
5 can establish where he's going.

6 MR. RAY: May I approach the witness?

7 THE COURT: You may.

8 Q. (By Mr. Ray) Mr. Pearson, I'm showing you  
9 Defendant's 9 and ask you if that looks like the  
10 State's file with exception of maybe the first page.  
11 And same question about Defendant's 7.

12 A. Yes.

13 Q. Defendant's 7 is the sexual assault exam;  
14 is that correct?

15 A. That's correct.

16 Q. Done over at Cook's hospital, I believe?

17 A. Yes.

18 Q. And Defendant's 9 is like the case file,  
19 the crime scene search, the evidentiary matters, some  
20 of the State's serology, some affidavits, that sort  
21 of thing; is that correct?

22 A. That's correct.

23 MR. RAY: Offer Defendant's 7 and 9.  
24 State's been given a copy.

25 THE COURT: Any objections?

1                   MR. CONDER: Concerning the entirety  
2 of it, may I ask Mr. Pearson a couple of questions?  
3 May I take him on voir dire, please?

4                   THE COURT: You may.

5                   VOIR DIRE EXAMINATION

6 BY MR. CONDER:

7           Q.     Mr. Pearson, have you reviewed anything  
8 that occurred since you finished your representation  
9 of Mr. Dunning?

10          A.     Yes.

11          Q.     And what have you reviewed since then?

12          A.     When the motion was brought to my  
13 attention, the first thing I wanted -- I found the  
14 record with the court reporter's help to read what I  
15 had said and the offer of proof. I reviewed that  
16 record, and then I reviewed -- I never found my own  
17 file. I went to find my own file because I wanted to  
18 know what had transpired during my representation,  
19 but Mr. Ray provided me with the sexual assault  
20 nursing evaluation exam and police report and the  
21 State's file.

22          Q.     Have you reviewed anything from the Texas  
23 Department of Public Safety, the lab reports?

24          A.     No.

25                   MR. CONDER: Judge, then we would need

1 for those parts to be separated from that because  
2 that aspect -- that aspect Mr. Pearson has not  
3 reviewed.

4 MR. RAY: Well, I don't have any  
5 concern if you don't consider it for that purpose.  
6 However, those documents, and you're just talking  
7 about Defendant's Exhibit 9, which is y'all's --  
8 you're not talking about 7, which is the lab report?

9 MR. CONDER: I'm just making sure  
10 you're not planning to question him about the lab  
11 report if he has not seen it.

12 MR. RAY: I'm not going to question  
13 him about DNA results. I am going to ask him a  
14 couple of questions about the sexual assault report  
15 which was done at the time. I don't know if that  
16 makes any difference.

17 MR. CONDER: Then we will withdraw  
18 that objection.

19 THE COURT: Very well. Defendant's  
20 Exhibits 7 and 9 will be admitted.

21 MR. RAY: And in that regard, Judge,  
22 I'm not arguing guilt-innocence of the Defendant.  
23 I'm going to get into some background information  
24 which I think is going to be established in about  
25 three more questions.

1 THE COURT: Okay.

2 DIRECT EXAMINATION (CONTINUED)

3 BY MR. RAY:

4 Q. Let me ask you this, David. The sexual  
5 assault exam and the police report essentially say  
6 the child was anally sexually assaulted; that was the  
7 accusation, correct?

8 A. Right.

9 Q. And the sexual assault exam has some  
10 findings by the sexual assault nurse that are  
11 consistent with that. There's some lesions or  
12 scratches or whatever you want to call it on this  
13 child's anus, correct?

14 A. Right.

15 Q. Now, you said you've been a lawyer for how  
16 long?

17 A. I guess this is my 26th year.

18 Q. Have you ever tried a DNA case?

19 A. Have I tried cases involving DNA? Yes.

20 Q. In your opinion in a sexual assault case of  
21 a child who is alleging that he's been anally  
22 sexually assaulted, would DNA findings on a piece of  
23 clothing the child was wearing at the time that had  
24 DNA on the back side of the pants or the underwear,  
25 if that was underwear that the child wore or was

1     wearing, would that be relevant in the guilt or  
2     innocence of the defendant potentially?

3             A.     Yes.

4             Q.     A no result could mean something, correct?

5             A.     Right.

6             Q.     Certainly if it was the Defendant in that  
7     case's DNA, that would be very good for the State,  
8     would it not?

9             A.     Correct.

10            Q.     And if the DNA findings were some third  
11     party unknown that were not the Defendant and not the  
12     perpetrator, that could also be relevant, correct?

13            A.     Right.

14            Q.     And in that last instance is it your  
15     opinion that that could be relevant and material in a  
16     jury finding that the person was not guilty if they  
17     believed all that?

18            A.     Yes.   It would be relevant.

19            Q.     It could go either way, but it would  
20     certainly be something that would be relevant; would  
21     you agree with that?

22            A.     Yes, no question.

23            Q.     Was there any question as far as you could  
24     tell when you were looking at the State's file  
25     whether the shorts in the sexual assault kit have the

1 proper chain of custody? Did it all appear like it  
2 was supposed to be in the State's case?

3 A. Yes. There was no chain of custody -- it  
4 was to me properly collected and preserved and so  
5 forth.

6 MR. RAY: I'll pass the witness.

7 THE COURT: Cross?

8 CROSS-EXAMINATION

9 BY MR. CONDER:

10 Q. Mr. Pearson, a couple of questions. First  
11 of all, the facts of the same examination that had  
12 been introduced to this Court, that was all new to  
13 you at the time your client pled guilty; is that  
14 correct?

15 A. You mean had I not seen --

16 Q. Had you reviewed each of those reports?

17 A. Yes. It wasn't new. I'd reviewed it.

18 Q. And had you reviewed that with the  
19 Defendant when you made that decision to plead  
20 guilty?

21 A. We had reviewed everything in the file.

22 Q. And does that include the serology report?

23 A. I'm not going to say that I specifically  
24 remember the conversation about that, but it was a  
25 heavy decision, a big trial. He was an habitual



1 offender, so we had a lot of jail visits, a lot of  
2 conversations. I'm sure we talked about the case  
3 from top to bottom.

4 Q. So would it be safe to assume, then, that  
5 you were aware -- that you as the attorney were aware  
6 of the results of the serology exam?

7 A. Yes.

8 MR. CONDER: May I approach the  
9 witness?

10 THE COURT: You may.

11 MR. CONDER: I think it's in here.

12 MR. RAY: It's in there, Steve.

13 Q. (By Mr. Conder) So if the report says that  
14 no semen was detected, would that have been a factor  
15 to your knowledge at the time?

16 A. I got distracted for a moment because I was  
17 listening to Ms. Bogus -- Ms. Boswell. I didn't hear  
18 your question. I apologize.

19 Q. If that report stated that semen was not  
20 detected at the time, would that be true and  
21 accurate?

22 A. About semen, correct.

23 Q. At the time you advised Mr. Dunning about  
24 whether to plead guilty, that you were aware of that  
25 fact?

1           A.     I was aware of that.

2           Q.     I don't want to get into anything specific,  
3 but during your direct examination by Mr. Ray you  
4 stated that the stepfather was the first person to  
5 whom identification was made. Do you recall -- is it  
6 not true that there were other people that the young  
7 man made an identification of Mr. Dunning to?

8           A.     My recall was he told his stepfather, who  
9 waited for mom to get home that night, and then later  
10 on he was just basically parroting or just saying,  
11 "That man had sex with me. That black man had sex  
12 with me," to his other individuals that heard him say  
13 that, but that was after he had said it or reported  
14 it to Lorne Clark.

15          Q.     If the offense report were to say that he  
16 identified the Defendant to a man -- a family friend  
17 prior to Lorne Clark, would that surprise you?

18          A.     That's not what I recall.

19                   MR. CONDER: May have I approach the  
20 witness?

21                   THE COURT: You may.

22          Q.     (By Mr. Conder) I'm showing Mr. Pearson a  
23 portion of what's marked Defendant's Exhibit No. 9,  
24 and if you could read that paragraph to refresh your  
25 memory beginning with the one, the victim.

1           A.    I'm reading what you're showing me, but --  
2   and I'm not trying to -- this is a narrative later in  
3   the report where a detective is summarizing his take  
4   on it.  I'm saying that if you read the report the  
5   way it's written, the initial police report, it  
6   supports my contention that he told Lorne Clark  
7   first.  This just says that he later or afterwards.  
8   It doesn't define a time.  So afterward, after Lorne  
9   Clark could have -- well, I'm not -- the theory was  
10   that Lorne Clark, the registered sex offender, would  
11   have coached him to say that, but I don't think  
12   that's definitive of what you're showing me.

13          Q.    Now, you were able to present that -- the  
14   exclusion of that evidence to the Court of Appeals;  
15   is that correct?

16          A.    Yes.

17          Q.    And the Court of Appeals upheld the trial  
18   court in that; is that correct?

19          A.    That's correct.

20          Q.    I just want to confirm a point I brought up  
21   on voir dire examination.  Have you had an  
22   opportunity to read any of the scientific reports  
23   that have come out involved in this DNA proceeding?

24          A.    No.

25          Q.    So your opinion is not based upon any of

1 the scientific reports that have been generated  
2 regarding this particular case?

3 A. What opinion are you talking about?

4 Q. Your opinion about the relevance of the  
5 evidence.

6 A. I think independent of that it's relevant,  
7 but with that evidence from what I've been told, if  
8 another person -- if not Mr. Dunning, then that would  
9 confirm its relevance. It's relevant. Even if I  
10 haven't read the reports, I know they exclude him, so  
11 I think it's relevant.

12 Q. You have not actually read the reports?

13 A. No, I have not.

14 Q. Okay. And do you recall at the plea  
15 hearing that Mr. Dunning testified?

16 A. I don't recall. I know for the limited  
17 purpose we talked about the range of punishment and  
18 if you go to trial and so forth, and I don't remember  
19 anything else.

20 Q. Do you recall him specifically admitting  
21 the offense on the stand before the Judge?

22 A. I don't recall that.

23 Q. If the reporter's record reflects that,  
24 would you have any reason to doubt that?

25 A. If he said that in the courtroom as part of

1 the plea bargain, if it's on the record, it's on the  
2 record.

3 MR. CONDER: I have no further  
4 questions.

5 THE COURT: Redirect.

6 REDIRECT EXAMINATION

7 BY MR. RAY:

8 Q. Just one clarification, David. When I  
9 asked you a question about the relevance of an  
10 unknown person's or a third person's DNA, I didn't  
11 intend for that to be a scientific question. I  
12 intended for that to be a trial or a strategy or a  
13 proof question. If you got a pair of shorts that are  
14 on a victim, and the victim says he's anally sexually  
15 assaulted, and the victim's DNA and some other  
16 person's DNA, which is not the Defendant, that's some  
17 pretty good proof for you as a defense lawyer; is  
18 that right?

19 A. Yes. There's no question it's relevant.  
20 Yes.

21 Q. There's nothing better than having the  
22 defendant in a criminal case accused of sexually  
23 assaulting somebody, and then DNA on that clothing  
24 that belongs to some other guy.

25 A. Right.

1 MR. RAY: That's all I have.

2 RECROSS-EXAMINATION

3 BY MR. CONDER:

4 Q. Mr. Pearson, what about if a victim's own  
5 DNA on his own clothes, would that be relevant to  
6 you?

7 A. If it's the victim's DNA?

8 Q. On his own clothes.

9 A. On his own clothes, that's not relevant in  
10 the sense that we're talking. I mean, it's relevant  
11 that it identified the victim was wearing the  
12 clothes, so that in combination with other matters  
13 could enhance the relevance of it.

14 MR. CONDER: No further questions.

15 MR. RAY: Nothing further.

16 THE COURT: Very well. May this  
17 witness be excused?

18 MR. RAY: He can be finally excused.  
19 He's got a trial.

20 THE COURT: Any objections?

21 MR. CONDER: I have no reason not to  
22 finally excuse him.

23 THE COURT: Very well. Mr. Pearson,  
24 you're excused.

25 (Witness steps down)

1 MR. RAY: Call Amy Lee.

2 THE COURT: Would you please raise  
3 your right hand.

4 (Witness sworn)

5 MR. RAY: May I proceed?

6 THE COURT: You may.

7 AMY LEE,  
8 having been first duly sworn, testified as follows:

9 DIRECT EXAMINATION

10 BY MR. RAY:

11 Q. State your name.

12 A. My name is Amy Lee.

13 Q. Amy, where do you live?

14 A. I currently live in San Francisco,  
15 California.

16 Q. What do you do in San Francisco?

17 A. I currently work as a criminalist with the  
18 San Francisco Police Department Criminal Laboratory.

19 Q. Generally what do you do there?

20 A. I screen biological fluids and process DNA  
21 analysis, evidence for DNA analysis, and I also write  
22 reports and testify in court.

23 Q. For the San Francisco Police Department?

24 A. Not currently for them, since I just  
25 started there last year.

1 Q. What did do you before that?

2 A. I used to work as a forensic serologist  
3 with the Serological Research Institute or SERI for  
4 short.

5 Q. Did you do the same thing at SERI?

6 A. For the most part, yes, and I was also  
7 their technical leader, which was in charge of the  
8 laboratory operations.

9 Q. What kind of education do you have that  
10 enables you to do that kind of work?

11 A. Education?

12 Q. Yes.

13 A. I received my bachelor of science degree  
14 from Cornell University, and a masters of forensic  
15 science degree from George Washington University.

16 Q. And when did you graduate from college and  
17 get your masters?

18 A. In 1998.

19 Q. So a little less than 20 years?

20 A. Yes.

21 Q. What kind of experience do you have between  
22 college and SERI? Tell us about that.

23 A. Between college and SERI?

24 Q. Yeah. What did you do before you worked at  
25 SERI?



1           A.    I used to work as a paralegal in a law  
2    firm.

3           Q.    How long did you work with SERI?

4           A.    I worked with SERI for about nine years.

5           Q.    You were asked to do some DNA testing in  
6    this case; is that correct?

7           A.    Yes, that's correct.

8           Q.    Have you done this type of testing in other  
9    cases?

10          A.    Yes, I have.

11          Q.    How many times do you think you've done  
12    testing just like what you did here in other cases?

13          A.    I have tested many cases. I don't know the  
14    exact number, but I would say at least in the  
15    hundreds.

16          Q.    Has your ability ever been called into  
17    question or your ethics by any person that you know  
18    of?

19          A.    No, it has not.

20          Q.    Serological Research Institute, they're in  
21    California as well?

22          A.    That's correct.

23          Q.    They're actually in Richmond, which is over  
24    across the bay from San Francisco; is that right?

25          A.    Yes.

1           Q.    Can you tell us some of the clients -- of  
2   course, when you worked for the San Francisco police,  
3   they're your only client, correct?

4           A.    Currently, yes.

5           Q.    While you were working for SERI, tell us  
6   some of the clients that you had done DNA testing  
7   for, that you personally had done DNA testing for  
8   while you worked there?

9           A.    SERI is a private nonprofit laboratory, and  
10   when I worked at SERI we worked with clients that  
11   were both from prosecution and defense, so we worked  
12   with police departments. We worked with DA's offices  
13   as well as defense attorneys, Innocence Project and  
14   individual -- individuals.

15          Q.    Did you ever do any work for the FBI?

16          A.    Yes.

17          Q.    Did you ever do any work for the Los  
18   Angeles County Police Department?

19          A.    Yes.

20          Q.    Did you ever do any work for the San  
21   Francisco County Police Department?

22          A.    Yes.

23          Q.    How about San Diego?

24          A.    I believe so, yes.

25          Q.    Would most of your work be primarily in the

1 western part of the United States?

2 A. They primarily have been, yes.

3 Q. But you've actually done work for cases in  
4 Texas; is that correct?

5 A. Yes.

6 Q. And you've testified in this very  
7 courthouse several times, have you not?

8 A. Yes.

9 Q. Has your testimony been accepted and have  
10 you qualified as an expert in those cases as well as  
11 other places you've testified?

12 A. Yes, I have.

13 Q. How many times have you testified, if you  
14 had to put a number on it, in Texas?

15 A. I can't remember. At least five.

16 Q. You testified for me several times; is that  
17 correct?

18 A. Yes.

19 Q. You've testified for other lawyers in this  
20 state?

21 A. No.

22 Q. When you did the testing in this case, I  
23 want to kind of summarize. I think we're all  
24 familiar with when DNA testing is done. Let me ask  
25 it this way. When you do the testing, is there a

1 science of DNA testing that has rules and procedures  
2 that you have to follow?

3 A. Yes. Our laboratory had -- well, SERI's  
4 laboratory when I was working with SERI had a  
5 standard operating procedure, SOP, and that basically  
6 defined limits and protocols of each scientific  
7 procedure.

8 Q. Did there have to be a certification for  
9 your lab to do this type of testing?

10 A. Yes. SERI is ASCLD accredited, so that's a  
11 nationally recognized or internationally recognized.

12 Q. And in Texas we have a thing called the  
13 Forensic Science Commission; is that correct?

14 A. That's correct.

15 Q. And there was a time -- and that's  
16 relatively new compared to the ASCLD certification;  
17 is that correct?

18 A. Yes.

19 Q. There was a time before SERI was actually  
20 certified under the Texas Forensic Science Commission  
21 guidelines; is that correct?

22 A. Yes.

23 Q. And is it fair to say that part of the  
24 holdup in this case, because when we first started  
25 until you were actually able to test it is you had to

1 be, you or the lab, had to be certified by the  
2 Forensic Science Commission; is that correct?

3 A. Yes.

4 Q. And you've met Dr. Bruce Budowle, who is a  
5 genetics expert; is that correct?

6 A. Just met.

7 Q. But you know who he is?

8 A. Yes.

9 Q. You don't have a problem with his  
10 qualifications?

11 A. No.

12 Q. He's actually the person that the State got  
13 to look at your protocols and your procedures and  
14 ultimately gave the go for SERI to be qualified; is  
15 that correct?

16 A. That's correct.

17 Q. All right. You did some DNA testing in  
18 this case; is that correct?

19 A. Yes.

20 Q. And there had already been some DNA testing  
21 done by the Texas Department of Public Safety; is  
22 that correct?

23 A. Yes.

24 Q. And so can you tell us what you reviewed  
25 prior to your testing?

1           A.     What I reviewed?

2           Q.     Yes.   You know what the things you  
3 reviewed?   I'm assuming you reviewed their report.

4           A.     Right.   I don't recall right now what the  
5 report looks like.

6           Q.     Okay.   Let me ask you this.   Tell us --  
7 let's talk about what you tested in this case.

8           A.     Okay.

9           Q.     You need a copy of the report?

10          A.     I think I have a copy.

11                   MR. RAY:   May I approach the witness?

12                   THE COURT:   You may.

13          Q.     (By Mr. Ray)   Let's do it this way.   I'm  
14 showing you Defendant's Exhibit 1.   Let's move these  
15 over because they're not marked.   And I'm showing you  
16 Defendant's Exhibit 2, Defendant's Exhibit 3.   Let's  
17 start here.   Let's put these here, 4, 5 and 6.   Do  
18 you recognize Defendant's Exhibits 1, 2, 3, 4, 5 and  
19 6?

20          A.     Yes, I do.

21          Q.     Defendant's Exhibit 1 is your report; is  
22 that correct?

23          A.     Correct.

24          Q.     Defendant's 2 is the table of results  
25 that's actually contained in Defendant's Exhibit 1;

1 is that correct?

2 A. That's correct.

3 Q. Tell us what Defense 3 is.

4 A. These are the exhibit notes of each item.

5 Q. And that's not a part of this report, but  
6 it's a part of your lab file; is that correct?

7 A. That's correct.

8 Q. 4, 5 and 6, what are they?

9 A. Those are the electropherograms of the  
10 items that were tested.

11 Q. Or at least some of the items tested; is  
12 that correct?

13 A. That's correct.

14 Q. And the ones we're going to talk about here  
15 today, these electropherograms all have a number that  
16 kind of corresponds back to the report; is that  
17 correct?

18 A. The item number, yes.

19 Q. And so tell us what item numbers that 4, 5  
20 and 6 relate to?

21 A. Exhibit No. 4 relates to item number 4-3.

22 Q. Okay.

23 A. Exhibit No. 5 relates to item number 4-4,  
24 and Exhibit No. 6 relates to item number 5-2.

25 Q. And 4, 5 and 6 as well as 3 are all parts

1 of your lab file; is that correct?

2 A. Yes. They're part of the case file.

3 Q. You have personal knowledge of all these  
4 items; is that correct?

5 A. Yes.

6 MR. RAY: Offer Defendant's Exhibits 1  
7 through 6. State has been given a copy.

8 THE COURT: Any objection?

9 MR. CONDER: No objection from the  
10 State.

11 THE COURT: Exhibits 1 through 6 will  
12 be admitted.

13 Q. (By Mr. Ray) As I'm asking you some  
14 questions, if you refer to one of these documents or  
15 look at it, I want you to start out your answer with  
16 Defendant's Exhibit 1 or 2 or whatever.

17 A. Okay.

18 Q. So not only can the court reporter kind of  
19 notate which one we're talking about, but the State  
20 can also see what you're talking about as well.

21 A. Okay.

22 Q. Make things go a little faster. Let's talk  
23 on Defendant's Exhibit 2, which is the chart,  
24 essentially at the top of it you've got the victim's  
25 reference; is that right?



1           A.     That's correct.

2           Q.     That's the DNA profile that was provided;  
3     is that right?

4           A.     Yes.   That was from the Texas Department of  
5     Public Safety DNA Lab Report.

6           Q.     So you didn't test the victim.   You were  
7     provided the victim's profile and you used that; is  
8     that correct?

9           A.     That's correct.

10          Q.     What about Johnnie Dunning, were you  
11     provided his or did you test his?

12          A.     That was also provided.

13          Q.     So these numbers you were working from are  
14     all based on the State's numbers.   This is not  
15     something you did independently; is that correct?

16          A.     That's correct.

17          Q.     Now, let's go through this all the way down  
18     from 3-1, 4-3, 4-4, 5-1, 5-2, 5-3, 5-4, 5-7 and 5-8.  
19     Did you test all those items?

20          A.     Yes, I did.

21          Q.     And the sheet kind of speaks for itself,  
22     but the last one, for instance, 5-8, there's no  
23     results.   You didn't get a result there; is that what  
24     that means?

25          A.     Yes.

1 Q. "NR" means no result; is that correct?

2 A. That's correct.

3 MR. RAY: Judge, I've got a copy if  
4 you want to look at that.

5 THE COURT: That would be nice.

6 MR. RAY: That's Defendant's  
7 Exhibit 2.

8 THE COURT: Thanks.

9 MR. RAY: I think it would be a little  
10 easier for you to follow along. The prosecutors have  
11 been kind enough to allow me to use their exhibit for  
12 demonstrative purposes. Do you recognize what I've  
13 got here as the same thing that's on Defendant's  
14 Exhibit 2; is that correct?

15 A. Yes.

16 Q. Can you read that okay?

17 A. Yes.

18 MR. RAY: Can you read that Judge?

19 THE COURT: Not very well.

20 MS. BOSWELL: We can move it closer.

21 THE COURT: I didn't bring my driving  
22 glasses.

23 MS. BOSWELL: I couldn't read it ever.

24 MR. RAY: Can you see that now?

25 THE WITNESS: Yes.

1 MR. RAY: Can you see it now, Judge?

2 THE COURT: I can see it.

3 MR. RAY: It's probably easier just to  
4 look at the sheet. All right.

5 Q. (By Mr. Ray) Now, your report, which is  
6 Defendant's Exhibit 1, it kind of goes into detail  
7 about each of the things you tested; is that correct?

8 A. Yes.

9 Q. If we start at the top, reference sample  
10 from Johnnie Dunning is not tested; is that right?

11 A. Yes.

12 Q. Let's go through them, if you would. 3-1,  
13 come all the way down the line, and if it's something  
14 that doesn't have a mixture or it's solely from the  
15 victim, which a lot of these are, you can just  
16 abbreviate that, we don't need to spend a lot of time  
17 on.

18 A. Okay.

19 Q. Where I want to spend the time on is 4-3,  
20 4-4 and 5-2.

21 A. Okay.

22 Q. Fair enough?

23 A. Sure. Starting at 3-1?

24 Q. Start at 3-1.

25 A. So on Defendant's Exhibit 2 for item 3-1,

1     which were the white shorts, they were swabs that I  
2     had taken from the outer sides of the shorts, and  
3     what I obtained was a very weak single source -- what  
4     appeared to be a single source sample that was  
5     consistent with the victim.

6           Q.     If the victim had worn those shorts, you  
7     would expect that, would you not?

8           A.     Yes.

9           Q.     So what about 4-3?

10          A.     For item 4-3, which were the shorts waist  
11     band swab, and that was a swab that I had received  
12     from, I believe it was the Texas DPS, and that was a  
13     mixture. Hold on. Let me just take a look at my  
14     report here. It was a mixture of at least two  
15     individuals. And I was unable to determine a major  
16     portion to this mixture, so for the major portion I  
17     excluded both the victim and Mr. Dunning, but I could  
18     not make any conclusions as to the minor portion.

19          Q.     Let's kind of break that down. Item 4-3,  
20     which is referenced also in your conclusions on the  
21     last page, next to the last page of your report, is  
22     that correct, your conclusions start on the next to  
23     the last page?

24          A.     That's correct. It's item five in the  
25     conclusions.

1                   MR. RAY: Judge, you don't have a copy  
2 of her report, do you?

3                   THE COURT: No, sir.

4                   MR. RAY: Can I approach?

5                   THE COURT: You may.

6                   MR. RAY: It's marked that she's  
7 reading from, it's Defendant's Exhibit 1.

8 BY MR. RAY:

9           Q. Let's go back. Item 4-3, your conclusion  
10 is actually number five on the next to the last page?

11          A. That's correct.

12          Q. So what you're saying is the victim, who  
13 used his initials, or initials for him, and Johnnie  
14 Dunning are excluded as possible contributors to the  
15 major portion; is that correct?

16          A. That's correct.

17          Q. So is there a minor portion?

18          A. Yes.

19          Q. And were you able to draw any conclusions  
20 about the minor?

21          A. No.

22          Q. So essentially what you've got is you've  
23 got DNA from two people?

24          A. At least two people, yes.

25          Q. Can you say whether it's more than two?

1           A.    Not conclusively, no.

2           Q.    And in your opinion Johnnie Dunning is  
3 excluded?

4           A.    From the major portion.

5           Q.    Could he be included in the minor or can  
6 you just not tell?

7           A.    I can't tell.

8           Q.    And the victim, the same response for the  
9 victim?

10          A.    Yes.

11          Q.    Now, there's some dispute about that  
12 between you and Dr. Budowle; is that correct?

13          A.    That's correct.

14          Q.    You've read his affidavit, correct?

15          A.    Yes.

16          Q.    Is he wrong or are you wrong or how do we  
17 get to that?

18          A.    Well, I think how -- because this is --  
19 there's dropout in this mixture, and there is not any  
20 conclusive, I guess, determination as to the number  
21 of contributors, in terms of the protocols based on  
22 the validations that we used, our interpretation  
23 guidelines, my interpretation of what composed the  
24 major portion tends to not consider anything that was  
25 under stochastic, which means that it's anything

1 other than the numbers that are in brackets --

2 Q. Let me stop you just a second. Stochastic,  
3 that's a threshold?

4 A. Correct.

5 Q. And you're not considering anything under  
6 that; is that correct?

7 A. As part of the major portion, yes.

8 Q. So is that why you excluded the victim from  
9 that mixture?

10 A. That's correct, because the victim at the  
11 first location had the -- has the alleles 11,13,  
12 where at 4-3 it was 13,14.

13 Q. So essentially what you're saying is it  
14 can't be the victim?

15 A. That's correct, for the major portion.

16 Q. If you lower and you start considering  
17 things below the stochastic threshold, does that  
18 change the results potentially?

19 A. Yes.

20 Q. Let's look at 4-4, and that's a different  
21 swab, correct?

22 A. Yes. That's a different swab.

23 Q. And 4-4 and 5-2 are actually kind of  
24 related; is that correct? One's the extract and  
25 one's a swab; is that correct?

1           A.     That's correct.

2           Q.     But 4-4 and 5-2 on the Table of Results,  
3     which is Defendant's Exhibit 2, we're talking about  
4     DNA that came from the same place on the underwear;  
5     would that be right?

6           A.     Yes.

7           Q.     Presumably unless somebody was just making  
8     something up.

9           A.     Correct. I received these samples, so yes.

10          Q.     Tell us about your findings in regard to  
11     4-4 and 5-2.

12          A.     So for 4-4, item 4-4, which were the shorts  
13     crotch swab, and 5-2, which were the shorts crotch  
14     extract, I believe -- hold on a second. I found a  
15     mixture of at least two individuals in both samples.  
16     The victim was included as the major contributor to  
17     both mixtures.

18          Q.     You would expect that if it was his shorts,  
19     wouldn't you?

20          A.     Yes.

21          Q.     We haven't said this. You can get DNA  
22     results from a piece of clothing that a person has  
23     worn. That's what you're saying, right?

24          A.     Yes.

25          Q.     And the evidence in this case was that



1     these shorts belonged to the victim, so it would not  
2     come to any surprise to anyone that the victim would  
3     be a contributor, and it's very likely he could be  
4     the major contributor, fair enough?

5           A.     That's a possibility, yes.

6           Q.     You said there was another contributor.  
7     Tell us about that.

8           A.     There is a mixture of at least two, one of  
9     which is the victim. Mr. Dunning is excluded as a  
10    possible contributor to both mixtures.

11          Q.     So what you're saying in summary is the DNA  
12    on the victim's shorts, and this is -- if we go back  
13    and look, these are shorts that the swab actually  
14    came from -- where was the swab? What part of the  
15    underwear did the swab touch? It's the rear area of  
16    the pants; is that right?

17          A.     I believe it was described as "crotch."

18          Q.     And that sample there has two people's DNA,  
19    right?

20          A.     At least, yes.

21          Q.     One of them belongs to the victim, right?

22          A.     Correct.

23          Q.     And the other one does not belong to  
24    Johnnie Dunning; is that right?

25          A.     That's correct.

1           Q.    Any question in your mind that's the  
2    result?

3           A.    Well, based on these results, yes.

4           Q.    Yeah.  That's what I'm getting at.  Your  
5    testing shows there's two people's DNA on this kid's  
6    underwear or shorts, whatever you want to call them,  
7    one of them is the victim and one of them is not  
8    Johnnie Dunning.

9           A.    Correct.

10          Q.    That means it's got to be somebody else?

11          A.    Yes.  There's at least another person  
12    there.

13          Q.    And Dr. Budowle's affidavit, you read it,  
14    right?

15          A.    Yes.

16          Q.    He doesn't agree with that, does he?

17          A.    No.

18          Q.    His disagreement is only in regards to item  
19    4-3 that we already talked about, right?

20          A.    That's correct.

21          Q.    But when it comes to item 4-4 and 5-2,  
22    Dr. Budowle's affidavit and your testimony are the  
23    same; is that right?

24          A.    That's correct.

25          Q.    He's not disputing that in his affidavit?

1           A.     No.

2                     MR. RAY:   May I approach the witness?

3                     THE COURT:   You may.

4           Q.     (By Mr. Ray)   I'm showing you Defendant's  
5 Exhibit 8.   That's Dr. Budowle's affidavit, correct?

6           A.     Yes.

7           Q.     You read that prior to your testimony?

8           A.     Yes.

9                     MR. RAY:   I offer Defense 8.

10                    THE COURT:   Any objections?

11                    MR. CONDER:   No objections, Your  
12 Honor.

13                    THE COURT:   Defense Exhibit 8 will be  
14 admitted.

15                    MR. RAY:   Can I have just a moment,  
16 Judge?   I need to check for something.

17                    THE COURT:   You may.

18           Q.     (By Mr. Ray)   This No. 8, item 3-1, 4-3 and  
19 so on?

20           A.     Uh-huh.   Yes.

21           Q.     Did you generate those numbers or did those  
22 come to you from somewhere else?   Where did they come  
23 from?

24           A.     They came from the electropherograms that  
25 were produced.

1           Q.    Right.  Is that a number that you generated  
2           or was that a number you already had from the State's  
3           report I'm getting at?

4           A.    For the evidence items?  They were numbers  
5           I generated.

6           Q.    Okay.  So in any particular order or is it  
7           just as you came to them?  In other words, 3-1,  
8           that's a number that happened to be the third thing  
9           you looked at; is that right?

10          A.    That was what was checked in chain of  
11          custody and identified as item three, yes.

12          Q.    That's a number that you assigned to it?

13          A.    Yes.

14          Q.    And then your electropherograms, I think  
15          you said were -- they were three, four, five and six;  
16          is that correct?

17          A.    I believe it's up to four or five.  There's  
18          no item six.

19          Q.    Do you have them up there with you?

20          A.    I'm sorry.  What?

21          Q.    Do you have 4, 5 and 6?

22          A.    Oh, of the exhibits, yes.

23          Q.    Four is the electropherogram for the item  
24          4-3, correct?

25          A.    Yes.

1           Q.    And then 5 is the electropherogram for 4-4,  
2 right?

3           A.    Correct.

4           Q.    And then 5 -- excuse me. Exhibit 5 is your  
5 number 4.4.

6           A.    4-4, yes.

7           Q.    And your Exhibit 6, Defendant's Exhibit 6,  
8 is item 5-2?

9           A.    That's correct.

10          Q.    Exhibits 5 and 6 are essentially like we  
11 were talking about a minute ago, this is basically  
12 the same piece of evidence, that being a swab and the  
13 extract from the same spot; is that correct?

14          A.    Yes, that is.

15          Q.    And Defendant's Exhibit 4, which is item  
16 4-3, that's a different swab?

17          A.    That's correct.

18          Q.    And Dr. Budowle's affidavit agreed with  
19 your findings concerning 5 and 6, Defendant's 5 and  
20 6, which are items 4-4 and 5-2, correct?

21          A.    Correct.

22          Q.    And the dispute is over 4.3; is that  
23 correct?

24          A.    That's correct.

25          Q.    And the dispute has to do with the victim's

1 DNA, not the Defendant's, right?

2 A. That's correct.

3 Q. So Johnnie Dunning is excluded at 4-3 as  
4 well; is that correct?

5 A. Correct, in the major portion, yes.

6 Q. And you can't make any determinations about  
7 the minor portion there?

8 A. That's correct.

9 Q. So even if Dr. Budowle's conclusion about  
10 item 4-3 is correct and yours is incorrect, he's not  
11 disputing the fact that Johnnie Dunning's DNA is not  
12 the major contributor there; is that correct?

13 A. That's correct.

14 Q. What he's saying is it's probably the  
15 victim's DNA is the major portion.

16 A. That's correct.

17 MR. RAY: I'll pass the witness.

18 THE COURT: Cross.

19 CROSS-EXAMINATION

20 BY MR. CONDER:

21 Q. Ms. Lee, my name is Steve Conder, and I  
22 apologize up front if I butcher some terms. Unlike  
23 some of the other people here, I'm probably not as  
24 knowledgeable in science, so feel free to correct me  
25 if I get some of this terminology mixed up. What

1 information did you review? Can you recall at all?

2 A. Off the top of my head, not very much. I  
3 think I had the laboratory report from the Texas DPS,  
4 which is where I obtained the DNA profiles from the  
5 reference samples.

6 Q. But you weren't provided any other type of  
7 case-related information?

8 A. I do not believe so.

9 Q. And then did you in doing this make any  
10 assumptions regarding contributors that you expected  
11 to find there?

12 A. Yes. For the sexual assault kit, the anal  
13 swab and the perianal swab which was taken from the  
14 victim, when his -- the victim's profile was found on  
15 it, that was assumed, to be expected, and that was  
16 the only situation where I did that.

17 MR. CONDER: May I approach the  
18 witness?

19 THE COURT: You may.

20 Q. (By Mr. Conder) I'm showing you a  
21 technical review checklist. Would that reflect -- if  
22 it says that you checked that, that would reflect  
23 that that's everything you checked?

24 A. Yes.

25 MR. CONDER: We'll offer this

1 checklist as State's Exhibit 3.

2 MR. RAY: I don't have any objection.

3 THE COURT: Steve, is it possible to  
4 place the exhibit tag --

5 MR. RAY: That's the part I wanted to  
6 talk to you about.

7 MR. CONDER: There we go.

8 THE COURT: State's Exhibit No. 3 is  
9 admitted.

10 Q. (By Mr. Conder) If the technical review  
11 checklist indicate as check marks included the fact  
12 that you looked at all the photographs, the  
13 packaging, everything --

14 MR. CONDER: May I approach the  
15 witness?

16 THE COURT: You may.

17 Q. (By Mr. Conder) The technical review  
18 checklist, does that indicate that you reviewed the  
19 photographs and all the packaging and everything that  
20 came in?

21 A. No, no. This is the technical review of my  
22 case file.

23 Q. Okay.

24 A. So anything that I produce as related to  
25 this case was reviewed by another person, and then he



1 checked off.

2 Q. So this is not a list of what you reviewed?

3 A. No, no, no.

4 Q. And now was your report, was it tech  
5 reviewed after you conducted your analysis?

6 A. Yes. All our case files are tech reviewed  
7 and added reviewed.

8 Q. Let's look at the results that were found  
9 in -- I believe you testified on 3-1 on the white  
10 shorts, that that was the victim in this case; is  
11 that correct?

12 A. That's correct.

13 Q. And that that was a single source and it  
14 only matched to the victim?

15 A. As consistent, yes.

16 Q. And that was not a surprising result?

17 A. No, it's not.

18 Q. And then on 4-4, which is the -- let me  
19 back up for a minute. Can you explain to me how --  
20 what would you consider an intimate sample?

21 A. A sample that was taken from the person.

22 Q. But would you consider an item of clothing  
23 to be an intimate sample?

24 A. Sometimes underwear is considered intimate,  
25 but generally I will still try to associate a

1 statistic for items of clothing.

2 Q. I think -- let's look at item 4-3, the  
3 shorts swab since that appears to be the main  
4 contention here. I believe you testified that you  
5 were unable to determine a major; is that correct?

6 A. Actually I misspoke earlier. What I meant  
7 to say was that I determined the major portion, which  
8 based on SERI protocols was I'm looking at the four  
9 smallest locations of the profile and then pulling  
10 that out.

11 Q. And were you able to find a major?

12 A. Well, the major portion which I determined  
13 to be the allele types that were above the stochastic  
14 threshold.

15 Q. And that would be?

16 A. It would be D-8, which is the first  
17 location.

18 Q. Okay.

19 A. D-3, which is the fifth. The next would be  
20 D-19 and then D-5, which is the second to the last  
21 from the right.

22 Q. And you testified that you excluded the  
23 victim as a contributor based upon the results in  
24 D-8; is that right?

25 A. That's correct.

1 Q. And can you explain again why you did that?

2 A. Because one of his allele types was below  
3 the stochastic threshold.

4 Q. So if I can get this straight, there were  
5 two peaks of 13. Let me step back a minute. The  
6 victim is at 11, 13; is that correct?

7 A. That's correct.

8 Q. And the electropherogram showed they're a  
9 13 above stochastic threshold and 11 below?

10 A. Correct.

11 Q. And you excluded him based simply on that  
12 basis?

13 A. Yes, for the major portion.

14 Q. And what is the stochastic threshold for  
15 SERI labs?

16 A. The stochastic threshold is 150 RFU.

17 Q. And do you recall how far below the  
18 stochastic threshold the 11th allele was?

19 A. I believe it's just below, 147.

20 Q. And the allele at 13, that was a pretty  
21 significant one; is that correct?

22 A. Yes. That was 303.

23 Q. And it was significantly above the 14 that  
24 shows; is that correct?

25 A. The 14 is 169.

1           Q.    I just wanted to go ahead and walk through.  
2   On this second -- let's go first through -- you  
3   identified, I believe you said there were four  
4   significant ones that you looked at. The next one  
5   was the D-3; is that correct?

6           A.    Yes. They are the smallest loci, and the  
7   reason that we look at the smallest loci is because  
8   when we make these replicas or these duplicates of  
9   these locations, you're more likely to get more  
10   results when there is smaller pieces to replicate  
11   versus larger pieces, which are more likely to show  
12   degradation, and therefore, dropout.

13          Q.    On item 4-3, what was the alleles on D-3?

14          A.    The alleles for D-3 for items 4-3 is 15,  
15   16, and then in brackets 14, 18.

16          Q.    And what is the victim at D-3?

17          A.    The victim was 15, 16.

18          Q.    So would the victim match the one above  
19   stochastic?

20          A.    Yes. At that specific locus he is included  
21   as a major portion.

22          Q.    Let's go to D19. Am I reading this  
23   correctly that you found that on item 4-3 it was a 12  
24   and 14 is; is that correct?

25          A.    For the evidence sample, 4-3?

1 Q. For the evidence sample, 4-3.

2 A. I found 12, 13 and 14.

3 Q. And at that location the victim is a 12,  
4 14; is that correct?

5 A. That's correct.

6 Q. Just for clarification, Mr. Dunning is a  
7 12, 13.

8 A. Mr. Dunning, yes.

9 Q. And then at D5 you found an 11, 13 and 12  
10 on the 4-3 swab; is that correct?

11 A. Yes.

12 Q. And the victim is 11, 13?

13 A. That's correct.

14 Q. And Mr. Dunning is a 12, 13?

15 A. That's correct.

16 Q. Now, look at the ones that are below  
17 stochastic threshold. I believe on item 4-3 on D21  
18 that that was a -- you reached a 29 and 30; is that  
19 correct?

20 A. That's correct.

21 Q. And the victim is a 30?

22 A. Yes.

23 Q. On D7, you reached -- on 4-3 on D7 is a 9;  
24 is that correct?

25 A. Yes.

1 Q. And the victim is a 9,11?

2 A. That's correct.

3 Q. On THO, but like I said, please correct me  
4 if I use the wrong terminology of that.

5 A. That's fine.

6 Q. You found an 8 above stochastic threshold  
7 and 6,7 below stochastic threshold; is that correct?

8 A. That's correct.

9 Q. And the victim is a 6,8?

10 A. Yes.

11 Q. And Mr. Dunning is a 7,8?

12 A. That's correct.

13 Q. On D13 you found that the -- you found an  
14 11 and an 8. 11 above stochastic, 8 below?

15 A. That's correct.

16 Q. And the victim is an 11. On D16 you found  
17 in 11 above stochastic threshold, and the victim is  
18 11; is that correct?

19 A. Correct.

20 Q. On D2 you found a 20 below stochastic  
21 threshold, and the victim is a 20; is that correct?

22 A. That's correct.

23 Q. On VWA you found 17 above stochastic  
24 threshold and 16 below stochastic threshold on the  
25 swabs; is that correct?

1           A.     That's correct.

2           Q.     And the victim is a 17.

3           A.     Yes.

4           Q.     And on TPO you found 8 below stochastic  
5 threshold, and the victim is 8,11; is that correct?

6           A.     That's correct.

7           Q.     And last one on FGA you found a 25 above  
8 306 stochastic threshold, and a 20,23 below  
9 stochastic threshold; is that correct?

10          A.     Correct.

11          Q.     And the victim was as 20,25?

12          A.     That's correct.

13          Q.     So from my reading of this there were -- am  
14 I reading this wrong when I read this that there are  
15 nine different alleles the Defendant -- excuse me,  
16 the victim is at least in one portion of it above  
17 stochastic threshold?

18          A.     Yes.

19          Q.     And at four places he is below stochastic  
20 threshold?

21          A.     Sure. Okay.

22          Q.     And there was no place on the 4-3 swab  
23 where you found the result that he did not have some  
24 correlation to the victim; is that correct?

25          A.     I did find dropout, and some locations had

1 no results, but -- I could not make any conclusions  
2 as to the minor, and unfortunately, because based on  
3 our protocols I couldn't produce a statistic for him  
4 because he had an allele that was below stochastic at  
5 one of the four loci that I was looking at, so I  
6 could not include him as a contributor to the major  
7 portion.

8 Q. So I have this kind of in my head right,  
9 you excluded the victim as the contributor to this  
10 based upon having one of two alleles at one place  
11 below stochastic?

12 A. That's correct.

13 Q. And these were a pair of shorts that you  
14 were aware belonged to the victim?

15 A. Yes.

16 Q. I'm looking at protocols, and does a lot of  
17 dropout play any part in this decision to exclude  
18 him?

19 A. Yes.

20 Q. Can you explain?

21 A. Because if there's dropout, I cannot  
22 determine the number of contributors in a mixture, so  
23 I don't know for sure that the alleles that are  
24 present belong to any specific individual. So what I  
25 had to do was try to determine what the major portion



1     could be and what possible minor portion could be and  
2     then make my conclusions from that.

3           Q.     Now, did you use any results below  
4     stochastic threshold elsewhere to make determination?

5           A.     So if I can determine that there's a single  
6     source, so if I can assume single source, then yes, I  
7     can look below stochastic.

8           Q.     But not in any mixture case?

9           A.     No.   No.

10          Q.     Was 4-3 an indistinguishable mixture or  
11     could you even determine the major?

12          A.     I pulled out a major portion.   I couldn't  
13     find a major donor.

14          Q.     And was that in compliance with SERI's  
15     protocols on that?

16          A.     Yes.

17                   MR. CONDER:   We'll pass the witness.

18                   THE COURT:   Redirect.

19                   REDIRECT EXAMINATION

20     BY MR. RAY:

21           Q.     Just real quick.   So kind in summary,  
22     everybody agrees that Johnnie Dunning is excluded as  
23     the major contributor in 4-3, right?

24           A.     That's correct.

25           Q.     Everybody agrees that Johnnie Dunning is

1 excluded completely in 4-4 and 5-2; is that right?

2 A. That's correct.

3 Q. And in all three of those samples we've got  
4 two people's DNA at least, right?

5 A. That's correct.

6 Q. And looks like from hearing your testimony  
7 that the major portion of all these is the victim's,  
8 right?

9 A. It appears so, yes.

10 Q. So what we've got is we've got one that  
11 you've excluded the victim, but you've agreed based  
12 on his cross-examination, and you kind of look at it  
13 a little bit differently, the victim could be the  
14 major contributor and he might not necessarily be  
15 excluded. You just had a reason to do it, right?

16 A. Correct.

17 Q. You're basing your opinion on the facts  
18 presented to you, not police reports or anything  
19 else, right, although it seems logical that the  
20 victim's shorts, that he would be the major  
21 contributor, all other things being considered; would  
22 you agree with that?

23 A. That's true.

24 Q. We don't have that issue in 4-4 or 5-2  
25 because Johnnie Dunning is excluded, correct?

1           A.     Correct.

2           Q.     The victim is the major, right?

3           A.     Correct.

4           Q.     Two people's DNA, right?

5           A.     Correct.

6           Q.     So if one of them is the victim and the  
7 other one is not Johnnie Dunning, it's got to be some  
8 other person, right?

9           A.     Correct.

10                   MR. RAY:   That's all I have.

11                   THE COURT:   Recross.

12                   MR. CONDER:   Yes.   Just a couple of  
13 questions.

14                               RECROSS-EXAMINATION

15           BY MR. CONDER:

16           Q.     Your testimony regarding 4-3 was that you  
17 excluded Mr. Dunning from the major, that's correct,  
18 from your major portion?

19           A.     Correct.

20           Q.     But that you drew no conclusions regarding  
21 the minor portion?

22           A.     Yes, that's correct.

23                   MR. CONDER:   No further questions.

24                   MR. RAY:   Nothing further.

25                   THE COURT:   May this witness be

1       excused?

2                       MR. RAY: I will ask that she be  
3       excused.

4                       THE COURT: Any objection?

5                       MR. RAY: She's going to be around a  
6       little bit.

7                       MR. CONDER: We would like to ask her  
8       to stay just in case we need to recall her after Dr.  
9       Budowle.

10                      MR. RAY: Yes, that's fine.

11                      THE COURT: You are subject to recall.  
12       Thank you. You may step down.

13                      MR. RAY: May I have just a second?

14                      MR. CONDER: Can we take two minutes?

15                      THE COURT: Let's take a break, maybe  
16       ten minutes.

17                      (Recess taken, 10:16 to 10:31 a.m.)

18                      (Open court, Defendant present)

19                      THE COURT: Back on the record.

20                      MR. RAY: I will rest at this time.

21                      THE COURT: The Applicant has rested.  
22       You may proceed, State.

23                      MS. BOSWELL: State would call  
24       Dr. Budowle.

25

1 BRUCE BUDOWLE,  
2 having been first duly sworn, testified as follows:

3 DIRECT EXAMINATION

4 BY MS. BOSWELL:

5 Q. Do you have a copy of your resume in front  
6 of you, Dr. Budowle?

7 MR. CONDER: May I approach  
8 Dr. Budowle?

9 THE COURT: You may.

10 MR. CONDER: Here's a copy of your  
11 affidavit.

12 MS. BOSWELL: I'm going to go line by  
13 line through the 107 pages. I'm just kidding.

14 BY MS. BOSWELL:

15 Q. Dr. Budowle, can you give us a little bit  
16 of background how you're currently employed?

17 A. I'm now a professor at the University of  
18 North Texas Health Science Center and Director of the  
19 Center for Human Identification.

20 THE COURT REPORTER: You're going to  
21 have to speak up a little bit.

22 THE WITNESS: Sorry.

23 Q. (By Ms. Boswell) You want to try again?

24 A. I'm a professor at the University of North  
25 Texas Health Science Center and Director of the

1 Center for Human Identification.

2 Q. And can you give me a little bit of  
3 information about what it is that you do there?

4 A. Well, as a professor I have  
5 responsibilities to teach students, do research,  
6 service to the community as any other professor would  
7 do at a university. As the director of Center of the  
8 Human Identification we have a number of  
9 responsibilities. One is we're the designated  
10 Missing Persons Lab for the State of Texas, so all  
11 human remains found in Texas in theory should flow  
12 into our laboratory for identification purposes.

13 We also run a traditional forensic  
14 lab, and also we're a part of the CODIS system, which  
15 is the national DNA identification data base system,  
16 the index system, so that we're linked for potential  
17 solving of cases through DNA or at least get links  
18 through DNA.

19 We also have a National Missing and  
20 Unidentified Persons system data base that we've set  
21 up for allowing the police and other investigators  
22 and the public to provide information for  
23 identification purposes, and again, as I said,  
24 research and development in that area.

25 Q. Can you tell me a little bit about your

1 background?

2 A. I have a doctorate in genetics from  
3 Virginia Tech in 1979, and I did a postdoctoral  
4 fellowship at the University of Alabama doing cancer  
5 and diabetes research, and after that I joined the  
6 FBI to develop genetic marker testing for  
7 identification of body fluids and stains for forensic  
8 investigation purposes, and throughout my career I  
9 have advanced up and left the FBI in 2009 as the  
10 senior scientist of the laboratory division, and then  
11 I came here after that.

12 Q. And how many times have you assisted either  
13 the State or the Defense, I think in the federal  
14 system you say "the government," the government or  
15 the Defense in case analysis?

16 A. Oh, case analysis?

17 Q. With DNA. DNA case analysis. Excuse me.  
18 Forensic DNA analysis.

19 A. I thought you were going to ask me how many  
20 times I've testified because that's an easier one --

21 Q. That's next.

22 A. Too many to count.

23 Q. And how many times have you testified?

24 A. I stopped counting after about 250 for the  
25 same reasons.

1           Q.    And have you testified just for the  
2 government, just for the State, or have you testified  
3 for the Defense?

4           A.    As you might expect being at the FBI,  
5 predominantly for government, but since then a few  
6 times for the Defense while I was at the FBI for  
7 logistical kind of reasons that might occur, and  
8 since I've been out about 40 percent, 60 percent of  
9 defense and government.

10          Q.    And do you also have a position on the  
11 Texas Forensic Science Commission?

12          A.    Yes. I became a member this year.

13          Q.    And you are a commissioner?

14          A.    I guess that's what we call it.

15          Q.    And previous to that did you do any work  
16 with the Texas Forensic Science Commission?

17          A.    Yes. I think I was told to become a member  
18 -- helper of the commission when it became apparent  
19 that there were problems with DNA interpretation and  
20 mixtures throughout the State of Texas, something  
21 that's common to all the other states, but Texas took  
22 the progressive approach to address it.

23          Q.    And Mr. Ray asked Ms. Lee about the Texas  
24 Forensic Science Commission's review of SERI's  
25 protocol. Were you here when that question was posed



1 to her?

2 A. Yes.

3 Q. And I think the question was actually posed  
4 did you do that for the State, but you did not do  
5 that for the State, correct?

6 A. I don't understand.

7 Q. For us, for Tarrant County. You did not  
8 review SERI's protocol specifically for Tarrant  
9 County?

10 A. Oh no, no.

11 Q. Did you do that as part of your assistance  
12 with Texas Forensic Science Commission?

13 A. Yes. I was asked by the legal adviser to  
14 the commission as State -- I guess laboratories  
15 outside the State who provide the service had to be  
16 reviewed in the same manner as those within the State  
17 to see if their protocols would meet the level of  
18 expectation for case work analysis.

19 Q. And did you do the same sort of review for  
20 Texas labs then?

21 A. Yes.

22 Q. And I know that they discussed the fact  
23 that that review occurred. Were there any problems  
24 that you found in SERI's protocols?

25 A. Yes. They had some of the same problems in

1 mixture interpretation that we found in other labs  
2 throughout the State, and we went on conference call  
3 with them to address it.

4 Q. All right. Let's move on to this  
5 particular case. Like I said, I know that we could  
6 go through everything in your CV.

7 But unless you have some reason you  
8 want me to do that?

9 MR. RAY: No. That's fine.

10 Q. (By Ms. Boswell) So at contention here  
11 mostly is this item -- well, actually, let me take  
12 that back. Let's talk about this report. Do you  
13 have SERI's report in front of you?

14 A. Yes.

15 Q. Just very quickly, conclusion one.

16 A. Okay.

17 Q. I just want to go through that that is a  
18 conclusion that they made, that those profiles, the  
19 alleles that were consistent at that item 4-1 from  
20 DPS, which is actually -- well, it doesn't matter.  
21 Conclusion one that they said that that was  
22 consistent with the victim, correct?

23 A. Yes.

24 Q. And that is something that you don't  
25 disagree with?

1           A.    No.

2           Q.    And that's something that would be  
3 expected?

4           A.    Yes, because -- let me look at this one  
5 here. I mean, items of clothing from a victim, it's  
6 a reasonable expectation, 99 out of 100 times you  
7 would expect to see their DNA on their own clothing.

8           Q.    And I'm sorry. I went back up to  
9 conclusion one, and then I said 4-3, which 4-3 is a  
10 conclusion --

11          A.    Yeah. That's why --

12          Q.    -- so I confused that. I apologize. I'm  
13 going back to the first conclusion. I just very  
14 quickly want to run through those conclusions. With  
15 regard to conclusion one, two and three, before we  
16 get on to the ones at issue, do you have any issue  
17 with conclusion one?

18          A.    No.

19          Q.    Why is that?

20          A.    Again, I think the statement is that it's  
21 expected given the samples from this person. It's a  
22 reasonable conclusion.

23          Q.    And what about conclusion two?

24          A.    For the same reasons, I wouldn't have a  
25 problem per se.

1           Q.     And can you explain to me why it says that  
2     Mr. Dunning was excluded as a possible contributor to  
3     that mixture?

4           A.     When one compares a DNA profile from a  
5     reference sample of the individual, one has to look  
6     at the evidence and then see if the alleles or the  
7     points of DNA from the profile of the reference are  
8     observed in there, or if there are alleles in there  
9     that cannot be attributed to the individual. Now,  
10    there's some caveats, of course, as Ms. Lee had  
11    testified that when you start to get a low level, you  
12    might have some missing data or what we call a  
13    dropout, or that stochastic effect.

14                I don't know if anybody has explained  
15    what stochastic is, but it means random. So when you  
16    get to a certain point, things start to happen  
17    randomly and you can't control them as well, so  
18    therefore, it's -- you can start to take in peaks, so  
19    these DNA profile peaks really differ in amount.

20                The bigger peak suggests more DNA, the  
21    smaller peak less DNA, so when you get down to the  
22    levels such as the evidence in this case, they're all  
23    kind of moving up and down because they're not as  
24    controlled, the level of randomness in it. The  
25    allele dropout, the missing data, is the extreme of

1     that, so they're all in a continuum of variation, and  
2     it makes it more difficult to interpret.

3           Q.     But with regard to conclusion two, which is  
4     the perianal swab extract, that was concluded by SERI  
5     to be consistent with the victim.

6           A.     Yes.

7           Q.     And the Defendant was excluded?

8           A.     Yes.

9           Q.     But would you expect to see that he would  
10    be excluded from the intimate sample of the victim?

11          A.     I don't have any expectation when I do DNA  
12    typing. All I would see is that if there's DNA  
13    present, I would make a comparison, yet we can't  
14    predict that per se. There's a difference between an  
15    intimate or an item that someone wears versus someone  
16    else that you're asking the question about, so you  
17    shouldn't make any predetermined decision.

18          Q.     But this was in fact an intimate sample.

19          A.     You can call it an intimate sample. People  
20    have different definitions, but it was, you know,  
21    things that you would expect it to be, yes.

22          Q.     A perianal swab?

23          A.     Yes.

24          Q.     And what about conclusion three?

25          A.     I agree with that as well.

1           Q.    And is that also something that the  
2 Defendant is excluded because the victim is the main  
3 contributor in the profile?

4           A.    Well, that also -- the profile presents as  
5 a single source profile, so by nature if you're  
6 including the victim, which is a reasonable  
7 expectation given the evidence, then it would be a  
8 reason that other people would unlikely be the  
9 source.

10          Q.    So what about conclusion four?

11          A.    I think that's reasonable too.

12          Q.    Now, with regard to the conclusion on item  
13 4-4 and item 5-2, the Defense has indicated that or  
14 made the assertion that there's an alternate  
15 perpetrator given the minor mixture at issue there.  
16 Can you explain a little bit about why you would  
17 disagree or agree with that conclusion?

18          A.    Well, it's not so much agreement.  It's  
19 about being very cautious about moving forward.  
20 These are very low level DNA, so that means trace  
21 levels from all sorts of sources can be possibly on  
22 that material.  We'll get to that in a second.  
23 Second is SERI also does what we call an extra cycle  
24 in their PCR, 29 cycles.  For our lab we use 28 just  
25 to give an example.

1                   A cycle means when you're preparing  
2     the DNA, you're making copies of it, and the more  
3     copies we make the better it is that we can see  
4     results downstream generating a profile. So every  
5     time you do a cycle, you double the amount of DNA in  
6     theory. So if you do 28 cycles, you get a certain  
7     amount. If you do 29, in theory you might get close  
8     to double that, so you're increasing the amount that  
9     you see. So low level background stuff now becomes  
10    heightened, and one has to take that into  
11    consideration.

12                  Now, there's also been presentations  
13    and publications where you put people's clothing in  
14    the washing machine with stains from other clothing,  
15    and the DNA gets transferred onto the clothing, so we  
16    have to be very cautious when we get down to these  
17    low level heightened sensitivity assays when making a  
18    difference that because you see something at a low  
19    level, that all those things are at low level, that  
20    you attribute it to a perpetrator. I'm not saying it  
21    is. I'm not saying it's not. I'm just saying  
22    there's a lot of the explanations that are very  
23    reasonable, and to entertain one is, I think, a  
24    little dangerous.

25           Q.     So you would be cautious about making --

1 you would be cautious because of the level -- low  
2 level of DNA, you think it's dangerous to make any  
3 conclusion about that?

4 A. Well, I think especially here, what should  
5 have been done, wasn't done in this analysis, is if  
6 you -- when you get down to these low levels, people,  
7 of course, go into certain areas like on shorts  
8 because they're obviously the crotch is the place  
9 that one would look for that kind of evidence, but  
10 because we know there's low levels it might have been  
11 prudent in this case to take from other places around  
12 the underwear or shorts that wouldn't be likely to  
13 have it to see if there was background DNA under the  
14 same protocol and conditions that SERI ran these.  
15 That wasn't done, so we don't have data to make an  
16 inference to eliminate that so that it can support  
17 that there is another -- that this might be the  
18 perpetrator. They did not generate sufficient  
19 evidence to make that leap.

20 Q. Have you specifically seen instances  
21 where -- I'm going to say touch DNA, although that's  
22 not really accurate, where items of clothing have had  
23 touch DNA from innocent persons?

24 A. I think we did it all the time when we look  
25 at clothing when people have often mixtures there.



1 It's only when you have a good amount of DNA to  
2 distinguish from the background. As I said, we also  
3 tend to reduce the cycle number to try to reduce that  
4 background in that because it does complicate and  
5 give you a lot of noise that doesn't help necessarily  
6 to evaluate effectively what should be available in  
7 that profile.

8 Q. And with conclusion five, I'm sorry, with  
9 conclusion four, this is the one that you disagreed  
10 with in your affidavit?

11 A. I believe it's five.

12 Q. I'm sorry. I don't have my reading glasses  
13 on. I'm sorry, conclusion five. That is the one you  
14 disagreed with?

15 A. Yes.

16 Q. And you heard Ms. Lee's testimony regarding  
17 the locations, the various loci and the alleles at  
18 each location?

19 A. Yes.

20 Q. And can you just explain why you disagree  
21 with that?

22 A. Again, I think -- this is also one of the  
23 things we observed that happened after our first  
24 review of the some of the Texas labs that went to the  
25 other extreme. Now, I invented the stochastic

1 threshold, so I'm going to take credit for it, but  
2 what's happened is people draw a line in the sand,  
3 and they ignore everything else. Well, if you  
4 remember, one of the things peaks was -- the  
5 stochastic threshold is the value of 150. That's  
6 just the number that means the height of the peak.  
7 147 isn't very different than 150, and you're saying,  
8 "Well, I'm going to ignore that." We don't do that.

9           So what SERI has done is they've taken  
10 a very narrow naive approach and say, "I'm going to  
11 follow my protocol," but the reason that Texas labs  
12 got in trouble like we see in other labs is there was  
13 no thinking involved. If you don't think, you will  
14 make mistakes. And when you look at these peaks  
15 there, and you look at them, right down the line,  
16 allowing for some dropout, one cannot exclude the  
17 victim in any of those, and you heard the peaks and  
18 you can see them there.

19           And as you go from the small left side  
20 where there's more DNA, and you go to the right, you  
21 can see that you're dropping down to only a single  
22 contributor to the right, so there's one major as you  
23 go further on down that cannot exclude the victim,  
24 not surprising, because it's the victim's clothing,  
25 but because they've taken such a narrow approach and

1     they say it's a line in the sand, so 151 is real, 149  
2     doesn't exist, but 151 and 149 are so close, you can  
3     expect them to come from the same individual. One  
4     should never take that naive of an approach, and I  
5     think that they're not being responsible by not  
6     looking at the totality of the profile in making an  
7     inference. And I think as we kind of sort of allege  
8     to that in a sense because you said, well, if I look  
9     below that, there's a different conclusion, but this  
10    line in the sand is saying that person is excluded.  
11    At best they should have said inconclusive, to have  
12    that policy, because they should have looked above  
13    and below.

14           Q.     What are you doing when you're reviewing  
15    profiles? What approach are you taking?

16           A.     Again, we have protocols. We have  
17    stochastic thresholds, but we look at the totality  
18    and we look at the heights of the peaks, and we look  
19    not just at the left small side. We look to the  
20    middle and to the right. We evaluate the total  
21    profile to make an inference on whether to include,  
22    exclude or make an inconclusive call where you can't  
23    render interpretation one way or the other.

24           Q.     And is that one of the things that you  
25    worked on with the Texas labs and that you addressed

1 with the out-of-state labs that you reviewed?

2 A. Yes. People were drawing a line in the  
3 sand, and because of that they would be coming to  
4 wrong conclusions, and in fact, the statistics that  
5 were created were misrepresented in overstating the  
6 strength of the evidence, so we wanted to get that  
7 back to where it should be.

8 Q. Did you recently write a -- I'm going to  
9 call it a paper to try and help labs be able to make  
10 this type of appropriate conclusion?

11 A. Yes. We thought when we published all this  
12 back in 2000, 2001 and taught a lot at workshops at  
13 meetings, so you would think that by doing this, it  
14 would translate into the laboratories, and for a lot  
15 of, I think, reasonably good reasons that it doesn't  
16 always do so. And so a few of us that are involved  
17 in these kinds of work got together, a couple from  
18 NIST, one from a lab out of New Zealand, one from  
19 Harvard and myself, got together to codify it better,  
20 to give more guidance so that we would avoid the  
21 kinds of things and some of the things that SERI did  
22 in this case on the inclusion-exclusion situation, to  
23 give better guidance and help with the statistical  
24 analysis if one chooses that approach for statistics.

25 Q. And was that paper in the Texas Council on

1 Science and Technologies report on forensic science?

2 A. Yes.

3 Q. And they pointed to that paper as something  
4 that could assist in making mixture interpretations  
5 in CPI cases?

6 A. Yes.

7 Q. So was there anything that Ms. Lee said on  
8 the stand that you disagree with that you would like  
9 to explain?

10 A. Again, I just think this one issue there is  
11 the one that I would really disagree with. The rest  
12 is just protocols. If they have a protocol that says  
13 that they can't do a statistical analysis if certain  
14 conditions apply, that's their protocol. I might  
15 consider that I could do some in those cases. I'm a  
16 little -- I might say that I'm more gray than she is  
17 maybe, and that might have a little more effect on  
18 things, but we've gone through a lot of different  
19 analyses and things over many years of trying to  
20 address things, so I would say I would probably  
21 enhance their protocol some, but I don't think she's  
22 done wrong in that per se, but I do think this  
23 drawing a line and ignoring peaks that are close to  
24 each other is not a responsible way of interpreting  
25 inclusions and exclusions.

1           Q.    And with regard to conclusion five, which  
2   is the 4-4, 5-2 items, can you just reiterate --  
3   conclusion four, I'm sorry. Conclusion four, which  
4   is the 4-4, 5-2. Can you just reiterate why you  
5   would be reticent to draw any specific conclusion  
6   about the minor component in that?

7           A.    Again, because it's a heightened sensitive  
8   assay and background DNA, so there's a lot of  
9   explanation to be there, and they didn't take the  
10  control samples that would probably help in the  
11  interpretation, one should be cautious about  
12  inferring that that actually comes from the  
13  perpetrator, and that could be from all sorts of  
14  background.

15                   MS. BOSWELL: Pass the witness.

16                   THE COURT: Cross.

17                   CROSS-EXAMINATION

18   BY MR. RAY:

19           Q.    Dr. Budowle, you didn't prepare a report,  
20  did you?

21           A.    No, I didn't.

22           Q.    You didn't test it?

23           A.    I did prepare the affidavit.

24           Q.    Other than the affidavit, you didn't  
25  prepare a report?

1           A.     No.

2           Q.     Essentially you looked at maybe the State's  
3     file on the DPS results, correct? Did you look at  
4     that?

5           A.     Yes. I predominantly looked at the SERI  
6     result.

7           Q.     You look at SERI's results, and that's the  
8     basis of your testimony; would you agree with that?

9           A.     Yes.

10          Q.     Now, we've established that there was a  
11     chain of custody on this clothing that the victim  
12     wore. Were you aware of that?

13          A.     I'm not aware of that, but I think that's  
14     reasonable, yes.

15          Q.     It's reasonable that the police would come  
16     to a scene and say this is the -- this is the  
17     clothing that the victim wore, and the police would  
18     grab it, bag it, keep up with it and wouldn't stick  
19     it in a washing machine with some other people's  
20     clothing, right?

21          A.     No. But that's, I think, is an irrelevant  
22     point. It's what happened to the material, clothing  
23     before it got collected.

24          Q.     I understand.

25          A.     I would hope that at some point they were

1 sticking their clothes in washing machines.

2 Q. Sure. But what you said kind of a little  
3 while ago is you get this crossover, and you get some  
4 extra DNA in something, and you said there was a  
5 study that had confirmed that you could stick  
6 clothes, clothing, in a washing machine, and you  
7 could get my DNA on your shirt so to speak?

8 A. Right.

9 Q. Do you have any evidence that you've seen  
10 in this case to support that happening?

11 A. Again, that's the whole point, is that when  
12 you take a heightened sensitive assay, and you have  
13 background information on clothing, one has to be  
14 cognizant of that and enter that into your  
15 interpretation, and one shouldn't be venturing  
16 anything about the source of those particular items.  
17 They are more like noise and trace issues that needs  
18 to be considered.

19 Q. Well, if the facts were that the clothing  
20 was mixed up with other clothing, other person's  
21 unrelated clothing or it wasn't, if we knew the  
22 answer to that question, that could make a  
23 difference; would you agree with that?

24 A. I said that you could have helped yourself  
25 in the process by taking samples from other parts of



1 the clothing to help guide and get better inferences  
2 on what could have happened. But again, the mixing  
3 is not after collection. The mixing was just normal  
4 every day behavior.

5 Q. All right. Now, you've looked at SERI's  
6 report, and you came to some conclusions which you  
7 incorporated in your affidavit, right?

8 A. Yes.

9 Q. And would you agree with me that your  
10 affidavit, is it still accurate? Is what you said in  
11 your affidavit is true?

12 A. I agree so, yes.

13 Q. Your affidavit says, "I concur with the  
14 conclusions by SERI except for conclusion number  
15 five." Is that a true statement?

16 A. Yes.

17 Q. And conclusion five is the one we've talked  
18 about where Johnnie Dunning is excluded but what you  
19 were really talking about was the victim -- you  
20 probably wouldn't have excluded him based on this  
21 149, 151 discussion that you gave us a minute ago; is  
22 that correct?

23 A. That's correct.

24 Q. If number five wasn't even in there, if it  
25 just wasn't there at all, you would have concurred

1 with every single statement that Ms. Lee made,  
2 correct?

3 A. Yes.

4 Q. Everything else in her report is accurate,  
5 correct?

6 A. Yes.

7 Q. And Serological Research Institute, they've  
8 always been ASCLD certified, is that correct, or at  
9 least all times relevant for purposes for this case?

10 A. Well, I can't say always, but I think  
11 Ms. Lee testified they were, so I take that for what  
12 it is.

13 Q. And the question came up in conjunction  
14 with this case, did it not, that SERI was not  
15 certified by the Forensic Science Commission when we  
16 got ready to start testing this. Would you agree  
17 with that?

18 A. I believe that's correct from the  
19 testimony.

20 Q. And then Ms. Lynn Garcia, who's actually --  
21 what's her job for the Forensic Science Commission?

22 A. She's the legal adviser to the commission.

23 Q. Would you agree with me that testing in  
24 this case was held up because we had to get that all  
25 straightened out?

1           A.    I don't know the logistics of the timing of  
2   that.  All I know is where I was involved.  So I only  
3   came after the fact of something in this case was  
4   done, so I don't know if they were tied together or  
5   not.

6           Q.    Well, you personally are the individual and  
7   the scientist, and you've had credentials to do this,  
8   right?  You have the credentials and the expertise to  
9   look at a lab's protocols and see if they're accurate  
10  or incorrect; correct?

11          A.    Sure.

12          Q.    And you've done that for lots of labs,  
13  right?

14          A.    Yes.

15          Q.    And you did that for Serological Research  
16  Institute; is that correct?

17          A.    That's correct.

18          Q.    And they passed your --

19          A.    No, not exactly.  When we reviewed them,  
20  they had some issues with mixture interpretation.  I  
21  have not seen their protocols since then.  I was not  
22  a member of the commission, and I did my part.  So at  
23  the time they did, they still had issues that we  
24  identified.  Whether they passed or not, you would  
25  have to ask the commission at the time because I was

1 not on the follow-up.

2 Q. Did -- so did you not approve them or  
3 whatever you want to call it? Did you not work with  
4 them to get their approval for the Forensic Science  
5 Commission?

6 A. I worked on discussing with them what some  
7 of the issues were where Lynn Garcia was on the call,  
8 and after that I was not part of the follow-up that  
9 they actually -- how they modified their protocol on  
10 that. They may have. I'm just saying I was not a  
11 part of that.

12 MR. RAY: Judge, I need just a second.

13 THE COURT: Okay.

14 MR. RAY: Judge, this is going to take  
15 me a minute to find this. Can we take a short break?

16 MS. BOSWELL: We could stipulate to  
17 that fact. If they had not been accredited, we would  
18 have objected to their testimony.

19 MR. RAY: I understand, and quite  
20 frankly, that was what caused this case to basically  
21 be held up about, but I want to show the Court that  
22 document if I can have just a second. I think we're  
23 at the point where it needs to be something for the  
24 Court to consider now that it's been brought up.

25 THE COURT: Are you going to offer it

1 as an exhibit?

2 MR. RAY: I'm going to offer it as an  
3 exhibit. It's got a State seal on it.

4 MS. BOSWELL: That's fine, Your Honor.  
5 We would stipulate that they're accredited, because  
6 if you go to the Texas Forensic Science Commission's  
7 website, they have a listing where you can enter  
8 which labs in state and out of state are accredited  
9 under 38.35, and so we know them to be an accredited  
10 lab or else we would have objected to their testimony  
11 here.

12 THE COURT: All right.

13 MR. RAY: Judge, can I email this to  
14 you and have you print it out?

15 THE COURT: Sure. We can do that. If  
16 you would like, we can proceed and do that after.

17 MR. RAY: This letter references  
18 Dr. Budowle's work and SERI's accreditation. I'd  
19 like him to see it.

20 THE COURT: Okay. Let's take a 10  
21 minute break.

22 (Recess taken, 11:02 to 11:11 a.m.)

23 (Open court, Defendant present)

24 THE COURT: Ready to proceed?

25 MR. RAY: Yes. May I approach the

1 witness?

2 THE COURT: You may.

3 BY MR. RAY:

4 Q. Dr. Budowle, you've been provided a copy of  
5 this letter from the Texas Forensics Science  
6 Commission on the break; is that correct?

7 A. Yes.

8 Q. And I've got a copy of it just marked as  
9 Defense 10; is that right?

10 A. Yes.

11 Q. You recognize the letter that kind of talks  
12 about Serological Research's final accreditation by  
13 the Texas Forensic Science Commission?

14 A. Well, yes and no, I guess, because -- of  
15 course, that's the first time I saw it. So what I  
16 recognize is it explains some things of what I've  
17 identified as some issues that should be addressed  
18 before one would proceed in using SERI in the State  
19 of Texas, or at least my advice to the commission. I  
20 did just read the last paragraph, which Lynn Garcia  
21 says it's probably best to read the lines of that if  
22 that's okay.

23 Q. Well, when it's in evidence. You've got  
24 the letter, you've reviewed it; is that correct?

25 A. I've read it. I wouldn't say I've deeply

1 reviewed it because I just read it, but I have read  
2 it.

3 Q. You recognize it as their letterhead; is  
4 that correct?

5 A. Yes.

6 MR. RAY: I'll offer 10.

7 MR. CONDER: No objection.

8 THE COURT: Number 10 is admitted.

9 Q. (By Mr. Ray) Now, you can explain what you  
10 want to about the letter.

11 A. Just one point just for clarity because it  
12 does say at the end of the letter, "However, in an  
13 abundance of caution we would like to be sure that  
14 Dr. Budowle has an opportunity to review how the  
15 protocols are implemented and sample cases confirm  
16 our expectations." Just to be clear, I've never done  
17 that.

18 Q. They never asked you to do it?

19 A. No, no.

20 Q. And if you look over in the first page of  
21 the letter, kind of two-thirds of the way down, that  
22 letter, which is dated -- It's dated April 16th of  
23 2016?

24 A. I've got two, one that says April 29th.

25 Q. Excuse me. April 29th.

1           A.     So the April 29th one?

2           Q.     Yes.

3           A.     Okay.

4           Q.     That letter says SERI was accredited at  
5     that time as far as the Forensic Science Commission  
6     was concerned to do DNA testing in this state; is  
7     that correct?

8           A.     Yes.

9           Q.     All right. I'll pass the witness.

10                         REDIRECT EXAMINATION

11     BY MS. BOSWELL:

12           Q.     While we're on that letter, does your --  
13     does the letter identify things from your review that  
14     you consider to be issues with SERI's protocol?

15           A.     From what we reviewed these were things  
16     that they needed to address to get up to some level.

17           Q.     And going back to some of the previous  
18     questions that Mr. Ray asked you with regard to the  
19     shorts, do you know how many people might have worn  
20     those shorts?

21           A.     No.

22           Q.     And do you frequently see in DNA work the  
23     presence of transfer DNA?

24           A.     All I can say is we see low level samples.  
25     Whether they're transferred or whether they've been



1 on there for a while, I can't tell you.

2 Q. And Mr. Ray asked you about your  
3 conclusions in your affidavit. Are you changing  
4 anything in your affidavit right now with your  
5 testimony?

6 A. No. I agree essentially with what was done  
7 except for the one item of the victim's clothing in  
8 that one sample should be attributed to the victim,  
9 but at worst could have been an inconclusive.

10 Q. And specifically with regard to the  
11 exclusion of Mr. Dunning, and I'll put my reading  
12 glasses on so I don't get this wrong again, on number  
13 four, conclusion four, you're not now disagreeing  
14 with that exclusion?

15 A. No, no.

16 Q. What is it that -- what is the point that  
17 you're trying to make about that piece of evidence?

18 A. I think throughout these, the question  
19 about relevance, if anything, it's a low level and we  
20 should be very cautious about trying to infer that  
21 that means that this came from a perpetrator. It's  
22 just low level DNA, and we encounter it all the time,  
23 so we have to be cautious in making a leap to another  
24 level.

25 MS. BOSWELL: Pass the witness.



1 might be relevant in determining whether a person is  
2 guilty.

3 A. I tend to be a little cautious on that one,  
4 because depending on everything you do something has  
5 an effect. So if you're adding in all the possible  
6 things, certainly that could be. But I try to stay  
7 away from the guilt and innocence. As DNA people we  
8 only talk about source and no source. So we can say  
9 whether or not an individual could be associated with  
10 the evidence, but whether it's guilt and innocence,  
11 that's another whole set of information that's beyond  
12 what we should be doing.

13 Q. But the fact of the matter is you don't  
14 have any dispute that this little boy's underwear has  
15 got his DNA on it and got somebody else's DNA on it,  
16 right?

17 A. I don't dispute that, no.

18 Q. And that somebody else's DNA is not Johnnie  
19 Dunning's?

20 A. I don't dispute that, no.

21 MR. RAY: That's all I have. Thank  
22 you.

23 FURTHER REDIRECT EXAMINATION

24 BY MS. BOSWELL:

25 Q. Am I correct that what you testified to is

1     that you want, as a scientist for the legal  
2     community, to listen to scientific conclusions and be  
3     cautious about making leaps as to relevance of  
4     scientific testing?

5             A.     Yes.

6                   MS. BOSWELL:  No further questions.

7                   MR. RAY:  I don't have anything  
8     further of Dr. Budowle.

9                   THE COURT:  May this witness be  
10    excused?

11                   MS. BOSWELL:  Yes.

12                   THE COURT:  Thank you.  You may step  
13    down.

14                   MR. RAY:  Judge, I call Johnnie  
15    Dunning.

16                   MS. BOSWELL:  Real quick, since it's  
17    still passed to us, we had two exhibits --

18                   MR. RAY:  That's fine.

19                   MS. BOSWELL:  Your Honor, I would just  
20    ask to admit State's Exhibits 1 and 2.  One is the  
21    interpretation guidelines for SERI that were provided  
22    to us by Mr. Ray, and the second is just a portion of  
23    the offense report that he has already given that was  
24    not included in his packet.  We still don't waive  
25    anything with regard to our objections to all of

1     that, but in the -- for the purpose of making sure  
2     that we're complete, and that part was not included.

3                 THE COURT:   Okay.   Very well.

4                 MR. RAY:    I call Johnnie Dunning.

5                 MS. BOSWELL:   And again, Your Honor,  
6     we would object to anything that goes out of the  
7     scope of the 64 hearing to go into retrying the case.

8                 MR. RAY:    I'm going to ask him if  
9     identity was an issue.

10                THE COURT:   Very well.   You may  
11     proceed.

12                Mr. Dunning, if you would come up  
13     here.

14                (Defendant seated)

15                THE COURT:   Would you raise your right  
16     hand, please?

17                (Defendant sworn)

18                THE COURT:   You may proceed.

19                JOHNNIE DUNNING,  
20     having been first duly sworn, testified as follows:

21                DIRECT EXAMINATION

22     BY MR. RAY:

23                Q.    You're Johnnie Dunning; is that right?

24                A.    Yes, sir.

25                Q.    You're the Defendant in this case, right?

1           A.     Yes.

2           Q.     You understand you don't have to testify if  
3 you don't want to, right?

4           A.     I know that.

5           Q.     And you want to testify about what I'm  
6 going to ask you?

7           A.     Yes, please.

8           Q.     Also when David Pearson testified you said  
9 on the record that you didn't have any problem  
10 waiving whatever confidentialities y'all had for him  
11 to testify; is that correct?

12          A.     No, I didn't. I had no problem with that.

13          Q.     Okay. Just on one little area. You  
14 understand we're not retrying this case.

15          A.     Right.

16          Q.     That's not what this hearing is all about.  
17 Do you understand that?

18          A.     I understand.

19          Q.     So I want to talk about whether identity  
20 was an issue, and I explained to you that identity in  
21 a sexual assault case is a question that talks about  
22 the relationship between the victim, if you would,  
23 and the perpetrator?

24          A.     Right.

25          Q.     In other words, in a sexual assault case

1       there's two defenses, one being it wasn't me. Right?

2           A. Right.

3           Q. That's when identity is an issue. You  
4 understand that?

5           A. Yes, sir.

6           Q. And the other one is it wasn't sexual  
7 assault?

8           A. Yes.

9           Q. So, in other words, if a man rapes a woman  
10 and he says it's consensual, identity is not an issue  
11 in that instance. You understand that?

12          A. Right.

13          Q. But in a case where the defendant says, "I  
14 didn't do this. Somebody else did it," that's when  
15 identity is an issue. You understand that?

16          A. Right.

17          Q. So in your case identity was an issue; is  
18 that correct?

19          A. Correct.

20                   MR. RAY: I'll pass the witness.

21                   MS. BOSWELL: Nothing from the State.

22                   THE COURT: Very well. Thank you,  
23 Mr. Dunning.

24                   Anything further from either side?

25                   MR. RAY: No, sir, I'll rest and

1 close.

2 MR. CONDER: State rests and closes.

3 THE COURT: Very well. Would either  
4 side like to present closing arguments?

5 MR. RAY: I'll waive and let them go  
6 first.

7 STATE'S CLOSING ARGUMENT

8 MS. BOSWELL: Your Honor, I think we  
9 have to be really careful here. One of the reasons  
10 why the courts are so cautious about Chapter 64  
11 testing is the idea that we don't want to muddy the  
12 waters with irrelevant information. Now, the State  
13 agreed to the testing without agreeing to anything  
14 relating to relevance of the evidence or the results  
15 or the probativeness of either of those things in an  
16 abundance of caution and in the interest of fairness  
17 and justice.

18 And so agreeing to that doesn't then  
19 suddenly place some burden on us to show that the  
20 fact that we agreed to it then means that it's  
21 suddenly relevant. So the concern is exactly the  
22 type of situation that we see here. The testimony is  
23 that this is an indigenous item, an article of  
24 clothing that we don't know if multiple people have  
25 worn or what the details of what else it may have



1     come into contact with in handling, but it's not an  
2     intimate sample like an anal swab or a perianal swab.  
3     It's something that can have low levels of DNA on it  
4     as you've heard the experts testify.

5                 So to say -- to jump to the conclusion  
6     that because somebody's excluded from low level DNA  
7     on an item of clothing means that they've met the  
8     burden of showing by 51 percent that -- a  
9     preponderance of the evidence, that he is excluded,  
10    and it's reasonably probable that a jury would have  
11    found him not guilty in light of the other evidence  
12    that's presented at the trial, or in this instance at  
13    the plea which the Court has the transcript from that  
14    as well as the plea paperwork and everything that's  
15    in the clerk's file, everything that I'm sure that  
16    the Court would consider.

17                To make that conclusion is exactly the  
18    concern that we get into about Chapter 64 testing.  
19    That is why the burden shifts to the Defense to  
20    prove. So what we would say here is that the  
21    evidence from both experts is that the majority of  
22    the alleles that were located on these items in the  
23    intimate samples and the clothing samples were of the  
24    victim. The information that Mr. Ray presented  
25    regarding the offense report and the testimony from

1 Mr. Pearson about the serology report indicated that  
2 there was no semen, so there was no biological  
3 material that we would expect to contain a  
4 perpetrator DNA profile that was involved in this  
5 case. This is simply touch DNA on items of clothing.  
6 This is not an intimate sample or biological  
7 evidence.

8 So under Chapter 64 we would request a  
9 nonfavorable finding because the Defendant has not  
10 met the burden of proving that this exclusion is  
11 relevant and probative in light of all of the  
12 evidence that the Court would have before it, and  
13 including the evidence that we would say perhaps  
14 shouldn't be included in the Judge's consideration,  
15 but which the Judge did permit in this instance in  
16 order to address this issue. But we would be very  
17 cautious about getting into making any conclusions  
18 that basically would result in a retrial of the case  
19 and reconsidering the evidence that the Court had  
20 initially when it accepted this plea.

21 THE COURT: Very well. Mr. Ray.

22 DEFENSE'S CLOSING ARGUMENT

23 MR. RAY: The Court didn't have any  
24 DNA. There wasn't a jury to decide on any DNA  
25 testing because there wasn't any. I've tried about

1 30 of these, and I can tell you that if the State has  
2 DNA evidence that matches the Defendant, it is their  
3 star witness regardless of the number of alleles,  
4 regardless of the stochastic threshold, if it matches  
5 in any shape, form or fashion, it is their dynamic  
6 witness.

7           The shoe is on the other foot now. To  
8 say that evidence which the State's expert agrees  
9 with my expert, the defense expert, that there's two  
10 pieces -- there's two person's DNA on this article of  
11 clothing. One of them is the victim and one of them  
12 is not the Defendant to the exclusion of the rest of  
13 the world, of anybody that's ever lived, is the best  
14 piece of evidence that I could have. There's nothing  
15 better than having DNA evidence on an article of  
16 clothing.

17           We're not discussing the evidentiary  
18 matters in this case. I understand that, but there's  
19 nothing to indicate that it was not this way, that  
20 being the chain of custody on the evidence which  
21 everybody agrees was good. The evidence --  
22 evidentiary matters that you've received of the  
23 police report which includes the crime scene,  
24 officers obtaining this evidence, there's nothing in  
25 there that indicates that this evidence was tampered

1 with, that it was put in the washing machine, that it  
2 was mixed with someone else's evidence. That would  
3 all come out if we had a trial, okay. There's  
4 nothing to indicate that it was mixed with anything  
5 else.

6           So we have to look at it here as  
7 though it's the way it is. For us to have unknown  
8 DNA from another person on that article of clothing  
9 would be the best piece of evidence that I could  
10 have. And I would submit to you that I've proven  
11 that's what we have, because that's what Ms. Lee  
12 said, and Dr. Budowle has no quarrel with that, okay.  
13 He said it two or three different ways. He said it  
14 in his affidavit. He said it on direct examination.  
15 He said it on cross-examination.

16           Item number four in his affidavit says  
17 what Ms. Lee said about item 4.4 and 5.2, that this  
18 Defendant's DNA is not on those shorts, and somebody  
19 else's is, and that is just -- you can't have a  
20 better piece of evidence than that. If that's what  
21 you had at trial and if we tried this case, or we had  
22 tried it or someone had tried it back whenever this  
23 case was disposed of, and that was the piece of  
24 evidence, I would submit to you that there is way  
25 more than just preponderance of the evidence that a

1 jury would have found this man not guilty, because  
2 somebody else -- if it had been me, that's what I  
3 would have been standing on top of.

4 I would have been screaming at the top  
5 of my lungs, regardless of the number of extraneous  
6 offenses, if there were any, regardless of any eye  
7 witnesses, anything else, this guy's DNA is not on  
8 those pants. The State has kept those pants in a  
9 secured state, and to say that that does not acquit  
10 him flies in the face of justice. That's what's  
11 wrong here.

12 All I have to prove is by a  
13 preponderance of the evidence. Just tip the scales,  
14 and an exclusionary DNA finding has got to do at  
15 least tipping of the scales. So I would submit to  
16 you that this is a favorable ruling we're entitled  
17 to. We have proven this. This case has a long  
18 history that I'm not going to go into, but the fact  
19 of the matter is this guy has been shortchanged at  
20 every opportunity through no fault of these  
21 prosecutors or the Court, but the clerk's file  
22 indicates he writes this letter, and it's four years  
23 before we even pick up the paper and say what's the  
24 matter with him.

25 The first judge that hears this says

1     you're not entitled to a lawyer. What's the worst  
2     possible thing you can do to a guy when the statute  
3     says you can get a lawyer, and you don't -- we're not  
4     going to give you one. And he picks up the pen and  
5     files a notice of appeal, and then these prosecutors,  
6     to their credit, they agree that we ought to at least  
7     do some DNA testing. I applaud the State for doing  
8     that. I think that's admirable. Mr. Conder said  
9     it's the right thing to do, I think are the words he  
10    used, and that's exactly right, and I appreciate  
11    that.

12                   We tested at the Department of Public  
13    Safety. We got no finding. I get a lab. They test  
14    it. It excludes it. The State's expert, who's  
15    probably -- we'd still be reading his resume if we  
16    were talking about it -- who's probably the leading  
17    authority in this field, and he says it's right. How  
18    can you have any other finding? So I would submit to  
19    you we are entitled to it, and we have proved that  
20    there is more than a preponderance of the evidence  
21    that we're entitled to a favorable finding, and I'd  
22    ask the Court to enter that finding.

23                   THE COURT: Thank you, Counsel. Off  
24    the record for a moment.

25                   (Discussion off the record)

1                   THE COURT: Back on the record. We've  
2 all conferred about this matter, and the court  
3 reporter will have 30 days to complete the record,  
4 after which the parties will have 30 days to file any  
5 additional briefing or proposed findings. Is there  
6 anything further for today?

7                   MR. RAY: No.

8                   MR. CONDER: Nothing from the State,  
9 Your Honor.

10                  THE COURT: Very well, then. That  
11 will be it for today. Thank you.

12                  (Proceedings concluded, 11:33 a.m.)  
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1 STATE OF TEXAS


2 COUNTY OF TARRANT

3 I, Jana Kay Bravo, Deputy Official Court  
4 Reporter in and for the 371st District Court of  
5 Tarrant County, Texas, do hereby certify that the  
6 above and foregoing contains a true and correct  
7 transcription of all portions of evidence and other  
8 proceedings requested in writing by counsel for the  
9 parties to be included in this volume of the  
10 Reporter's Record in the above-styled and numbered  
11 cause, all of which occurred in open court or in  
12 chambers and were reported by me.

13 I further certify that this Reporter's  
14 Record of the proceedings truly and correctly  
15 reflects the exhibits, if any, offered by the  
16 respective parties, if requested.

17 I further certify that the total cost for  
18 the preparation of this Reporter's Record is  
19 \$\_\_\_\_\_ and was paid/will be paid by Tarrant  
20 County.

21 WITNESS MY OFFICIAL HAND, on this the 28th day  
22 of March, 2017.

23   
24 \_\_\_\_\_  
25 Jana Kay Bravo, CSR  
Texas CSR No. 1565, Exp:12/31/18  
Deputy Official Court Reporter  
371st District Court  
Tarrant County, Texas 76196

Jana Kay Bravo, CSR